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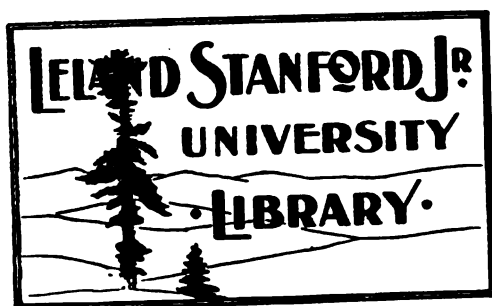
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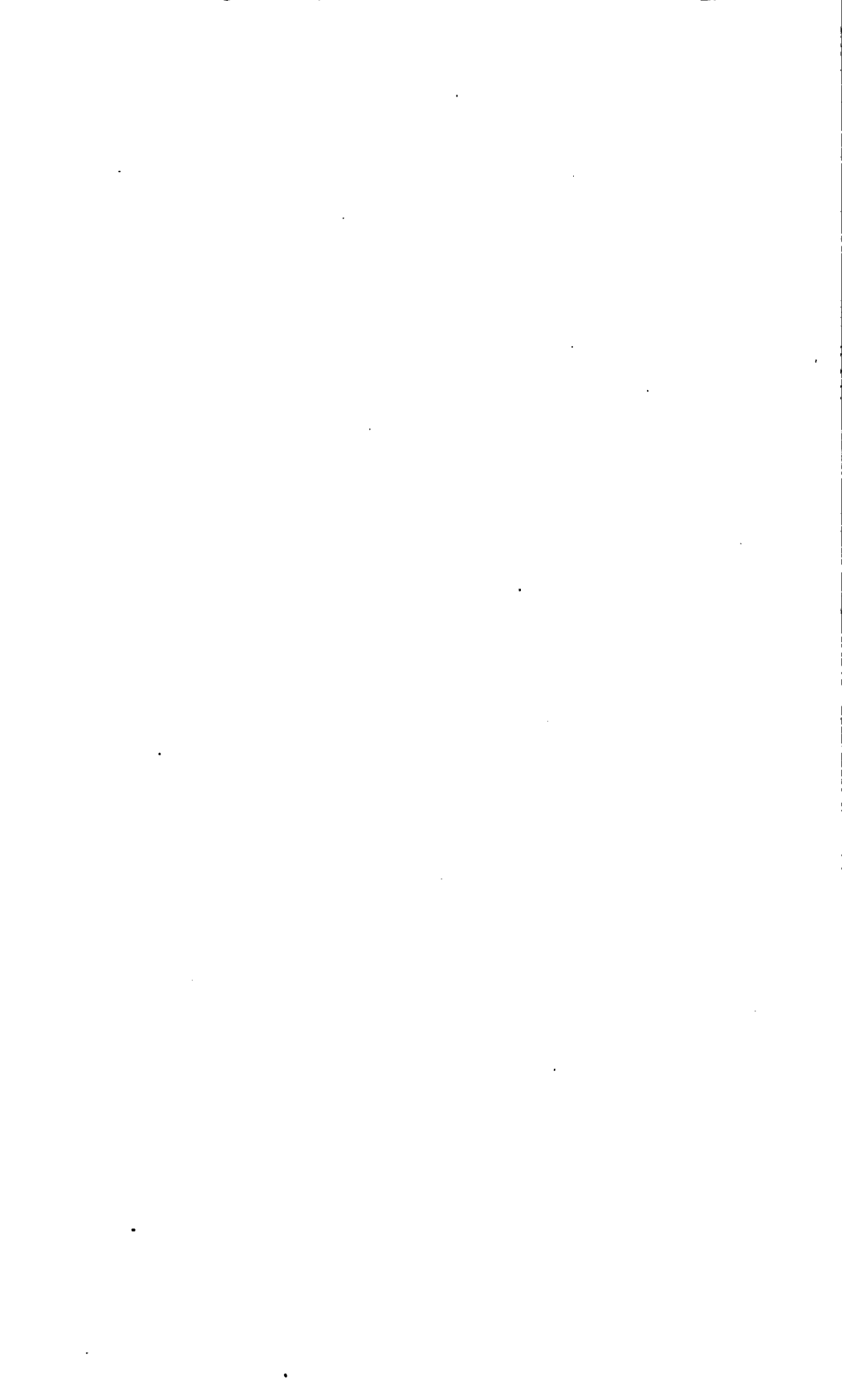
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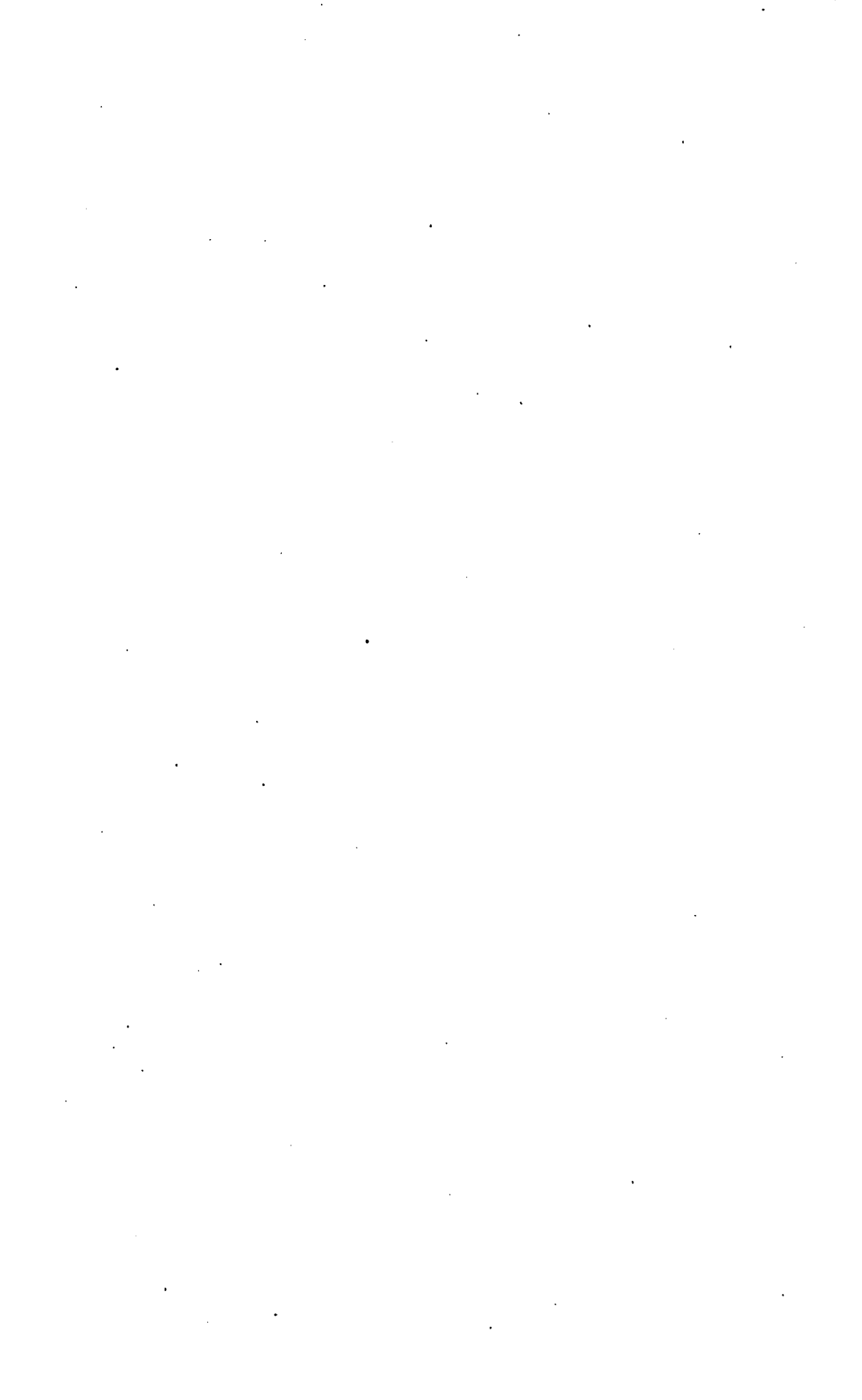


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THE
AMERICAN
RAILWAY REPORTS

A COLLECTION OF
ALL REPORTED DECISIONS RELATING TO
RAILWAYS

BY
JOHN A. MALLORY
OF THE NEW YORK BAR

VOL. II

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1874.

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TABLE

OF

CASES REPORTED IN THIS VOLUME.

A.

	PAGE
Alexander <i>v.</i> Atlantic, Tennessee & Ohio Railroad Com- pany.....	181
Allyn <i>v.</i> Boston & Albany Railroad Company.....	399
Antisdel <i>v.</i> Chicago & Northwestern Railway Company.....	467
Atlantic, Tennessee, & Ohio Railroad Company <i>ads.</i> Alex- ander.....	181
Austin <i>v.</i> Rutland Railroad Company.....	46

B.

Barker <i>ads.</i> People <i>ex rel.</i> Buffalo & State Line Railroad Company.....	149
Barrie <i>ads.</i> Chicago & Northwestern Railway Company.....	451
Bigelow <i>v.</i> West Wisconsin Railway Company.....	20
Bookless <i>ads.</i> Toledo, Peoria, & Warsaw Railroad Com- pany.....	454
Boston & Albany Railroad Company <i>ads.</i> Allyn.....	399
Boston & Albany Railroad Company <i>ads.</i> Wheelock.....	402
Buffalo & State Line Railroad Company <i>v.</i> Supervisors of Erie County.....	163
Burroughs <i>v.</i> North Carolina Railroad Company.....	213
Butts <i>ads.</i> Kansas Pacific Railway Company.....	477

C.

Chicago & Alton Railroad Company <i>v.</i> People.....	242
Chicago & Alton Railroad Company <i>ads.</i> People <i>ex rel.</i> City of Bloomington.....	66
Chicago & Northwestern Railway Company <i>ads.</i> Antisdel.....	467
Chicago & Northwestern Railway Company <i>v.</i> Barrie....	451

	PAGE
Chicago & Northwestern Railway Company <i>ads.</i> Dewey	369
Chicago & Northwestern Railway Company <i>ads.</i> Jackson	473
Chicago & Northwestern Railway Company <i>ads.</i> Kellogg	483
Chicago & Northwestern Railway Company <i>v.</i> Shultz...	417
Chicago, Burlington, & Quincy Railroad Company <i>v.</i> Stumps.....	385
City of Cincinnati <i>ads.</i> Walker.....	84
Coal Valley Mining Company <i>v.</i> Peoria & Rock Island Railroad Company.....	295
Commonwealth <i>v.</i> Pittsburgh, Fort Wayne, & Chicago Railroad Company.....	220
Conkey <i>v.</i> Milwaukee & St. Paul Railway Company....	353

D

Davis <i>v.</i> New York Central & Hudson River Railroad Company.....	394
Dewey <i>v.</i> Chicago & North Western Railway Company.	369

E

Eames <i>v.</i> Worcester & Nashua Railroad Company.....	462
--	-----

F

Fairbury, Pontiac, & Northwestern Railway Company <i>ads.</i> Marsh	82
Felt <i>ads.</i> Monadnock Railroad.....	166
Field <i>ads.</i> New Orleans, Jackson, & Great Western Rail- road Company	439
Forty-Second Street & Grand Street Ferry Railroad Company <i>ads.</i> Ihl.....	409

G

Gougar <i>ads.</i> Michigan Central Railroad Company.....	421
---	-----

H

Hannibal & St. Joseph Railroad Company <i>ads.</i> Trico...	445
Hartley <i>ads.</i> Indianapolis, Bloomington, & W. Railway Company	59
Hobart <i>v.</i> Milwaukee City Railroad Company.....	35
Hoitt <i>ads.</i> Melvin.....	195
Hougan <i>v.</i> Milwaukee & St. Paul Railway Company...	43
Hudson River Railroad Company <i>ads.</i> Johnson.....	285
Hudson River Railroad Company <i>ads.</i> Nelson.....	305

TABLE OF CASES.

v

I	PAGE
Ihl v. Forty-Second Street & Grand Street Ferry Railroad Company	409
Illinois Central Railroad Company <i>ads.</i> Mulligan.....	323
Illinois Central Railroad Company v. Phillips.....	374
Indianapolis, Bloomington, & W. Railway Company v. Hartley.....	59

J

Jackson v. Chicago & Northwestern Railway Company	473
Jackson and Sharp Company v. Philadelphia, Wilmington, & Baltimore Railroad Company.....	70
Johnson v. Hudson River Railroad Company.....	285
Jones <i>ads.</i> State.....	228

K.

Kansas Pacific Railway Company v. Butts.....	477
Kellogg v. Chicago & Northwestern Railway Company..	483

L.

Lloyd v. Pacific Railroad Company.....	448
Louisville & Nashville Railroad Company v. Norton....	436

M.

McDuffee v. Portland and Rochester Railroad	261
Marsh v. Fairbury, Pontiac, & Northwestern Railway Company.....	82
Melvin v. Hoitt.....	195
Michigan Central Railroad Company v. Gougar.....	421
Michigan Central Railroad Company v. Mineral Springs Manufacturing Company.....	331
Milwaukee & St. Paul Railway Company v. Conkey....	853
Milwaukee & St. Paul Railway Company v. Horgan....	43
Milwaukee & St. Paul Railway Company <i>ads.</i> Price....	14
Milwaukee & St. Paul Railway Company <i>ads.</i> Thompson..	9
Milwaukee & St. Paul Railway Company <i>ads.</i> Welch....	1
Milwaukee & St. Paul Railway Company <i>ads.</i> Wood....	342
Milwaukee City Railroad Company <i>ads.</i> Hobart	35
Mineral Springs Manufacturing Company <i>ads.</i> Michigan Central Railroad Company.....	331
Monadnock Railroad v. Felt.....	186
Mulligan v. Illinois Central Railroad Company.....	329

N.	PAGE
Nash <i>ads.</i> Pacific Railroad Company.....	430
Nashville & Chattanooga Railroad Company <i>v.</i> Thomns.....	433
Nelson <i>v.</i> Hudson River Railroad Company.....	305
New Orleans, Jackson, & Great Western Railroad Com- pany <i>v.</i> Field.....	430
New York Central Railroad Company, Matter of the Ap- plication of.	175
New York Central & Hudson River Railroad Company <i>ads.</i> Davis.....	394
North Carolina Railroad Company <i>ads.</i> Burroughs.....	213
Norton <i>ads.</i> Louisville & Nashville Railroad Company.	436
O.	
Olcott <i>v.</i> Supervisors of Fond du Lac County.....	115
Old Colony & Newport Railway Company <i>ads.</i> South- worth.....	426
P.	
Pacific Railroad Company <i>ads.</i> Lloyd.....	448
Pacific Railroad Company <i>v.</i> Nash.....	430
Pennsylvania <i>ads.</i> Philadelphia & Reading Railroad Company.....	127
Pennsylvania <i>ads.</i> Philadelphia & Reading Railroad Company.....	142
People <i>ads.</i> Chicago & Alton Railroad Company.....	242
People <i>ex rel.</i> Buffalo & State Line Railroad Company <i>v.</i> Barker.....	149
People <i>ex rel.</i> City of Bloomington <i>v.</i> Chicago & Alton Railroad Company.....	66
Peoria and Rock Island Railroad Company <i>v.</i> Coal Valley Mining Company.....	295
Philadelphia & Reading Railroad Company <i>v.</i> Pennsyl- vania.....	127
Philadelphia & Reading Railroad Company <i>v.</i> Pennsyl- vania.....	142
Philadelphia, Wilmington, & Baltimore Railroad Com- pany <i>ads.</i> Jackson & Sharp Company.....	70
Phillips <i>ads.</i> Illinois Central Railroad Company.....	374
Pittsburg, Fort Wayne, & Chicago Railroad Company <i>ads.</i> Commonwealth.....	220
Portland & Rochester Railroad <i>ads.</i> McDuffee.....	261
Price <i>v.</i> Milwaukee & St. Paul Railway Company.....	14

TABLE OF CASES.

vii

R.	PAGE
Rockford, Rock Island, & St. Louis Railroad Company v. Schunick	28
Rogers <i>ads.</i> St. Joseph Township.....	105
Rutland Railroad Company <i>ads.</i> Austin	40

S.

St. Joseph Township <i>ads.</i> Rogers.....	105
Sawyer v. Vermont & Massachusetts Railroad Com- pany.....	459
Schunick <i>ads.</i> Rockford, Rock Island, & St. Louis Rail- road Company.....	28
Shultz <i>ads.</i> Chicago & North Western Railway Company.	417
Sloan <i>ads.</i> State.....	236
Southworth v. Old Colony & Newport Railway Com- pany.....	426
State v. Jones	228
State v. Sloan.....	236
Stumps v. Chicago, Burlington, & Quincy Railroad Company	385
Supervisors of Erie County <i>ads.</i> Buffalo & State Line Railroad Company.....	163
Supervisors of Fond du Lac County <i>ads.</i> Olcott....	115

T.

Thomas <i>ads.</i> Nashville & Chattanooga Railroad Com- pany.....	433
Thompson v. Milwaukee & St. Paul Railway Company.	9
Toledo, Peoria, & Warsaw Railroad Company v. Book- less	454
Trice v. Hannibal & St. Joseph Railroad Company.....	445

V.

Vermont & Massachusetts Railroad Company <i>ads.</i> Sawyer	458
---	-----

W.

Walker v. City of Cincinnati.....	34
Welch v. Milwaukee & St. Paul Railway Company.....	1
West Wisconsin Railway Company <i>ads.</i> Bigelow.....	20
Wheelock v. Boston & Albany Railroad Company.....	402
Wood v. Milwaukee & St. Paul Railway Company.....	342
Worcester & Nashua Railroad Company <i>ads.</i> Eames....	432



TABLE OF CASES

CITED, COMMENTED UPON, OR EXPLAINED.

	PAGE
Albany, &c. R. R. Co. v. Osborn, 12 Barb. (N. Y.) 233.....	172
Aldrich v. Jessimin, 8 N. H. 516.....	192
Allyn v. Boston, &c. R. R. Co., 2 Am. Railw. Rep. 899.....	407
Almy v. California, 24 How. 109.....	139
Altham's Case, 8 Co. 155.....	190
Anderson v. Coonley, 21 Wend. 279.....	817
Andrea v. Thatcher, 24 Wis. 471.....	544
Andrews v. Todd, 50 N. H. 505.....	192
Angle v. Mississippi, &c. R. R. Co., 9 Iowa, 587.....	325, 326
Ansell v. Waterhouse, 2 Chitty, 1.....	266
Anson v. Towgood, 1 Jac. & W. 637.....	217
Atlantic, &c. Tel. Co. v. Commonwealth, 16 P. F. Smith (Pa.), 57.	222
Attorney General v. Chapman, 4 De Gex, McN. & G. 628.....	192
Aylesworth v. Chicago, &c. R. R. Co., 30 Iowa, 459.....	371

B.

Bachelder v. Heagan, 18 Me. 32.....	494, 530
Baltimore, &c. R. R. Co. v. Woodruff, 4 Md. 257.....	442
Bank of Commerce v. New York City, 2 Black, 620.....	181
Bank Tax Case, 2 Wall. 200.....	181
Barhyte v. Sheperd, 35 N. Y. 288.....	107, 178
Barker v. M. R. Co., 18 C. B. 46.....	278
Barnard v. Poor, 21 Pick. (Mass.) 878.....	494
Barnes v. Chapin, 4 Allen (Mass.) 444.....	538
Barret v. G. W. R. Co., 1 C. B. (N. S.) 423.....	279
Barron v. Eldredge, 100 Mass. 455.....	536
Bass v. Railroad Co., 28 Ill. 9.....	487
Baxendale v. B. & E. R. Co., 11 C. B. (N. S.) 787.....	279
Baxendale v. E. C. R. Co., 4 C. B. (N. S.) 68.....	278, 279
Baxendale v. G. W. R. Co., 5 C. B. (N. S.) 309.....	279
Baxendale v. G. W. R. Co., 14 C. B. (N. S.) 1.....	270

	PAGE
Baxendale v. G. W. R. Co., 16 C. B. (N. S.) 137.....	279
Baxendale v. L. & S. W. R. Co., L. R. (1 Exch.) 137; 4 H. & C. 130.....	279
Baxendale v. N. D. R. Co., 3 C. & B. (N. S.) 324	279
Baxter v. Boston, &c. R. R. Co., 102 Mass. 383.	461
Baxter v. Troy, &c. R. R. Co., 41 N. Y. 502.....	401
Baxter v. Wheeler, 49 N. H. G.....	367
Beadell v. E. C. R. Co., 2 C. B. (N. S.) 509.....	279
Beckman v. Saratoga, &c. R. R. Co., 3 Paige (N. Y.) 45.....	123
Belden v. New York & Harlem R. R. Co., 15 How. (N. Y.) 17... ..	171
Bennett v. Dutton, 10 N. H. 481	266, 267, 273
Bennett v. M. S. & L. R. Co., 6 C. B. (N. S.) 707.....	279
Benson v. Albany, 24 Barb. (N. Y.) 252.....	89
Bissell v. Jeffersonville, 24 How. 295.....	111
Bissell v. Michigan Southern, &c. R. R. Co., 22 N. Y. 258.....	438
Bissell v. New York Central R. R. Co., 25 N. Y. 442.....	811, 320
Blodgett v. Mohawk, &c. R. R. Co., 18 Wend. (N. Y.) 1.....	123
Bloom v. Burdick, 1 Hill (N. Y.), 130.....	166
Blossom v. Griffin, 13 N. Y. (3 Kern.) 509.....	180, 349, 361
Blundell v. Catterall, 7 E. C. L. 152.....	57
Boyle v. Reading R. R. Co., 54 Pa. St. 310.....	133
Bradley v. Geiselman, 22 Ill. 494.....	421
Branley v. S. E. R. Co., 12 C. B. (N. S.) 63.....	278
Branley v. S. E. R. Co., 12 C. B. (N. S.) 758.....	279
Bridgeport v. Railroad, 15 Conn. 475.....	111
Bridges v. Purcell, 1 Dev. & Bat. (N. C.) 402.....	78
Brintnall v. Saratoga, &c. R. R. Co., 32 Vt. 665.....	326
Brodhead v. Milwaukee, 19 Wis. 652.....	12
Browsers v. Merrill, 3 Chand. (Mich.) 46.....	544
Brown v. Brown, 43 N. H. 17.....	190
Brown v. Duplessis, 14 La. Ann. 842.....	37, 40
Brown v. Maryland, 12 Wheat. 419.....	147
Bryan v. Whistler, 3 Barn. & C. 288; 15 E. C. L. 219.....	78
Burroughs v. Housatonic R. Co., 15 Conn. 124.....	482
Burroughs v. Norwich, &c. R. R. Co., 100 Mass. 26.....	326
Bushnell v. Beloit, 10 Wis. 195.....	121, 126
Butler v. Dunham, 27 Ill. 474.....	110
Butterfield v. Western R. R. Co., 10 Allen (Mass.) 532... ..	400, 401, 407
Byrne v. Boadle, 2 H. & C. 722.....	383

C.

Canal Trustees v. Havens, 11 Ill. 554.....	61
Carpenter v. Railroad Co., 24 N. Y. 655	38

	PAGE
Carter v. Harlan, 6 Md. 20.....	78
Caterham R. Co. v. L. B. & S. C. R. Co., 1 C. B. (N. S.) 410....	279
Chaffee v. Boston, &c. R. R. Co., 104 Mass. 108.....	408
Chagrin Falls, &c. Plank Road v. Cane, 2 Ohio St. 419.....	80
Chapman v. Chicago, &c. R. Co., 26 Wis. 295.....	499
Charles River Bridge Company v. Warren, 7 Pick. (Mass.) 475...	124
Charlestown Branch R. R. Co. v. County Commissioners, 7 Metc. (Mass.) 78.....	461
Chase v. Sutton Manuf. Co., 4 Cush. (Mass.) 152.....	40
Chesley v. Pierce, 32 N. H. 402.....	200
Chicago v. Starr, 42 Ill. 174.....	383
Chicago, &c. R. R. Co. v. Gretzner, 46 Ill. 75.....	392, 394
Chicago, &c. R. R. Co. v. McLaughlin, 47 Ill. 205.....	393
Chicago, &c. R. R. Co. v. Parks, 18 Ill. 460.	278
Chicago, &c. R. R. Co. v. People, 56 Ill.....	251
Chicago, &c. R. R. Co. v. Sill, 19 Ill. 500.....	392
Cincinnati, &c. R. R. Co. v. Clinton County, 1 Ohio, 77..	89, 90, 91
Citizens' Passenger R. R. Co. v. Philadelphia, 13 Wright (Pa.) 251.	221
City v. Sampson, 9 Wall. 477.....	111
Clark v. Janesville, 10 Wis. 186..	121, 126
Clark v. Philadelphia, &c. R. R. Co.....	183
Clarkson v. Hudson River R. R. Co., 12 N. Y. (2 Kern.) 304....	293
Clayards v. Dethick, 12 Q. B. 489.....	513
Cleaveland v. Grand Trunk R. Co., 42 Vt. 449.....	494
Clivo v. Clive, Kay, 600.....	219
Coburn v. Harvey, 18 Wis. 147.....	530
Cochran v. Van Surley, 20 Wend. (N. Y.) 381.....	86
Cocker v. Cowper, 1 C. M. & R. 418.....	78
Coggs v. Bernard, 1 Smith L. Cas. 7th Am. ed.....	249, 341
Collins v. Bristol & Exeter R. R. Co., 11 Exch. 790.	325
Commissioners v. Nichols, 14 Ohio St. 260.....	110
Commissioners v. Wilkinson, 16 Pick. (Mass.) 175.....	36
Commonwealth v. Cleveland, &c. R. R. Co., 5 Casey (Pa.) 370....	221
Commonwealth v. Fitchburg R. R. Co., 10 Allen (Mass.) 189 ...	402
Commonwealth v. Temple, 14 Gray (Mass.) 75.....	40
Company v. Balch, 8 Gray (Mass.) 311.....	206
Cook v. Champlain Transp. Co., 1 Denio (N. Y.) 91.....	489
Cook v. Stevens, 11 Mass. 533.....	78
Cooley v. Port Wardens, 12 How. 299.....	139
Cooper v. L. & S. W. R. Co., 4 C. B. (N. S.) 738.....	279
Cowgill v. Long, 15 Ill. 203.....	110
Craig v. Rochester City, &c. R. R. Co., 39 N. Y. 404..	87, 38, 39, 40
Crandall v. Nevada, 6 Wall. 35.....	139, 140
Crouch v. G. N. R. Co., 9 W. H. & G. 550.....	278

	PAGE
Crouch v. G. N. R. Co., 11 H. & G. 742	278
Crouch v. L. & N. W. R. Co., 2 Carr. & K. 789	278
Crouch v. L. & N. W. R. Co., 14 C. B. 255	278
Cumberland Valley R. R. Co.'s Appeal, 62 Pa. St. 218	133

D.

Darling v. Railroad Co., 11 Allen (Mass.) 26	326
Davidson v. Nichols, 11 Allen (Mass.) 514	541
Davidson v. Ramsey County, Minn.	127
Day v. Stetson, 8 Greenl. (Mc.) 365	206
Den v. Baldwin, 21 N. J. L. (1 Zab.) 890	78
Detroit, &c. R. R. Co. v. Farmers', &c. Bank, 20 Wis. 122	327
Doc v. Hubbard, 15 Q. B. 240	192
Dorr v. New Jersey Steamboat Nav. Co., 11 N. Y. 486	311
Drew v. Sixth Ave. R. R. Co., 26 N. Y. 49	414
Dutton v. Strong, 1 Black, 23	57

E.

Earhart v. Young Blood, 27 Pa. St. 332	513
East Tennessee, &c. R. R. Co. v. St. John, 5 Sneed (Ky.) 525	438
Edwards v. G. W. R. Co., 11 C. B. 588	278
Elliot v. Piersol, 1 Pet. 328	166
Elliott v. Fair Haven, &c. R. R. Co., 32 Conn. 579	40
Elliott v. Railroad Co., 32 Conn. 579	87
Ellis v. Portsmouth & Roanoke R. R. Co., 2 Ired. 188	383
Elmore v. Naugatuck R. R. Co., 23 Conn. 457	326
Ernst v. Railroad Co., 35 N. Y. 28	513
Essex Turnpike Corp. v. Collins, 8 Mass. 292	206
Evansville, &c. R. R. Co. v. Dick, 9 Ind. 433	27
Everett v. Saltus, 15 Wend. 474	315

F.

Fairly v. Hastings, 10 Vcs. 123	424
Farmers', &c. Bank v. Champlain Trausp. Co., 21 Vt. 186	326
Fenner v. R. R. Co., 44 N. Y. 505	365
Fentiman v. Smith, 4 East, 107	78, 79
Fero v. Buffalo, &c. R. R. Co., 22 N. Y. 209	494
Field v. New York Central R. R. Co., 32 N. Y. 339, 383, 475, 494, 532	
Finnic v. G. & S. W. R. Co., 2 Macq. H. of L. Cas. 177 ; 34 Eng.	
L. & Eq. 11	278
Fitchburg R. Co. v. Gage, 12 Gray (Mass.) 393	278
Fogg v. Nahant, 98 Mass. 578	429
Foot v. New Haven, &c. R. R. Co., 23 Conn. 214	78

CASES CITED.

xiii

	PAGE
Ford v. Chicago, &c. R. Co., 14 Id. 616	37, 38
Foster v. Browning, 4 R. I. 47.....	78
Freeport v. Supervisors, 41 Ill. 495.	110
Fuller v. C. & N. W. R. R. Co., 31 Iowa, 211.....	284

G.

Galena, &c. R. R. Co. v. Yarnood, 17 Ill. 519.....	384
Gardiner v. Tisdale, 2 Wis. 195.....	37
Garton v. B. & E. R. Co., 1 B. & S. 112.. ..	275, 279
Garton v. B. & E. R. Co., 6 C. B. (N. S.) 639.....	279
Garton v. B. & E. R. Co., 4 H. & N. 33.....	279
Garton v. G. W. R. Co., 5 C. B., N. S., 669.....	279
Gaynor v. Old Colony, &c. R. Co., 100 Mass. 208.....	401
Gelpcke v. Dubuque, 1 Wall, 175.....	112, 118
Gibbons v. Mobile, &c. R. R. Co., 36 Ala. 410.....	127
Gibbons v. Ogden, 9 Wheat. 1.....	138
Giltman v. Philadelphia, 3 Wall. 713.....	139
Glorie v. South Carolina R. R. Co., 1 Strobbh. (S. C.) 70.....	171
Goodin v. Crump, 8 Leigh (Va.) 120.. ..	91
Goodwin v. Hardy, 57 Me. 143.....	219
Goold v. Chapin, 20 N. Y. 259.....	349, 365
Gould v. Hudson River R. R. Co., 6 N. Y. (2 Seld.) 522.....	56
Grant v. Courter, 24 Barb. (N. Y.) 232.....	89
Gray v. Jackson, 51 N. H. 9.....	266, 326
Griser v. Philadelphia, &c. R. Co., 8 Pa. St. 360.....	482

H.

Harris v. C. & W. R. Co., 3 C. & B. 693.....	279
Hart v. Western R. R. Co., 13 Metc. (Mass.) 99.....	494
Hartfield v. Roper, 21 Wend. (N. Y.) 615.....	416
Harvard College v. Stearns, 15 Gray (Mass.) 1.....	56
Harvey v. Lackawanna, &c. R. R. Co., 47 Pa. St. 428....	27
Hasbrook v. Milwaukee, 13 Id. 13.....	119
Havemeyer v. Iowa City, 3 Wall. 294.....	118
Haynes v. Thomas, 7 Port. (Ind.) 39.....	64
Hays v. Richardson, 1 Gill & J. (Md.) 38.....	78
Hemlins v. Shipman, 5 Barn. & C. 22; 11 E. C. L. 207.....	78
Hewey v. Nourse, 54 Me. 256.....	494
Heyl v. Philadelphia, &c. R. R. Co., 51 Pa. St. 469.....	75
Hickey v. Boston, &c. R. R. Co., 14 Allen (Mass.) 429.....	400
Hogan v. Eighth Avenue R. R. Co., 15 N. Y. 380.....	38

	PAGE .
Hollister v. Nowlen, 19 Wend. (N. Y.) 234.....	266
Hood v. New York, &c. R. R. Co., 22 Conn. 1, 502	326
Hooksett v. Concord R. R. Co., 38 N. H. 242.....	494
Hooper v. Chicago, &c. R. R. Co., 27 Mo. 81	349
Hopkins v. Wescott, 7 Am. Law. Reg. N. S. 533.....	329
How v. New Jersey Steam Nav. Co., 11 N. Y. 491.....	329
Hughes v. Parker, 20 N. H. 58.....	206
Hull v. Sacramento Valley R. R. Co., 14 Cal. 387	383
Hunter v. Middleton, 13 Ill. 54.....	61
Huyett v. Philadelphia, &c. R. R. Co., 23 Pa. St. 373.....	475

I.

Iba v. Hannibal, &c. R. R. Co., 45 Id. 469.....	450
Illinois Central R. R. Co. v. Copeland, 24 Ill. 232.....	325
Illinois Central R. R. Co. v. Goodum, 80 Ill. 117.....	382
Illinois Central R. R. Co. v. Mills, 42 Ill. 407.....	383, 482, 483, 487
Illinois Central R. R. Co. v. Nunn, 51 Ill. 78.....	487
Illinois Central R. R. Co. v. Phelps, 29 Ill. 447.....	382
Illinois Central R. R. Co. v. Reedy, 17 Ill. 580.....	382
Illinois Central R. R. Co. v. Swearingen, 33 Ill. 289.....	452, 472
Illinois Central R. R. Co. v. Swearingen, 47 Ill. 206.....	452
Illinois Central R. R. Co. v. Wren, 43 Ill. 77.....	454
Indianapolis, &c. R. R. Co. v. Kinney, 8 Ind. 402.....	450
Indianapolis, &c. R. R. Co. v. Oestel, 20 Ind. 231.....	450
Indianapolis, &c. R. R. Co. v. Paramore, 31 Ind. 143.....	482
Ingersoll v. Stockbridge, &c. R. R. Co., 8 Allen (Mass.) 438.....	494
Insurance Co. v. Tweed, 7 Wall. 44.....	542

J.

Jacques v. Chambers, 2 Coll. 435.....	219
Jeffrey v. Bigelow, 13 Wend. 518.....	
Jemison v. Camden, &c. R. R. Co., 4 Am. Law Reg. 234.....	326
Jetter v. New York, &c. R. R. Co., 2 Keyes (N. Y.) 154.....	513
Johnson v. Belden, 2 Lans. (N. Y.) 437.....	513
Johnson v. Stark, 24 Ill. 85.....	110
Jones v. E. C. R. Co., 3 C. B. N. S. 718	279

K.

Kallman v. United States Ex. Co., 3 Kans. 205.....	329
Ketchum v. Zeilsdorf, 26 Wis. 514.....	544
Keithsburg v. Frick, 31 Ill. 405.....	110
Knox v. Webster, 18 Wis. 406.....	544
Knox County v. Aspinwall, 21 How. 544.....	118

CASES CITED.

xv

	PAGE
L.	
Lachner v. Salomon, 9 Wis. 129.....	544
Lackawanna, &c. R. R. Co. v. Doak, 53 Pa. St. 379.....	475
Ladue v. Griffith, 25 N. Y. 864.....	349, 351, 365
Lansing v. Stone, 37 Barb. (N. Y.) 15.....	530
Laurence v. Winona & St. Peter's R. R.....	350
Leach v. Nichols, 55 Ill. 273.....	34
Lechman v. McBride, 15 Ohio, 201.....	89
Lechmere Bank v. Boynton.....	206
Lehigh Crane Iron Co. v. Commonwealth; 5 P. F. Smith, 448....	221
Lewis v. G. W. R. W., 5 H. & N. 867.....	312
Libbey v. Hodgdon, 9 N. H. 394.....	294
London v. N. W. R. W. Co., 7 H. & N. 600.....	312
London & North Western Railway v. Bartlett, 7 H. & N. 400....	315
Low v. Concord, &c. Railroad, 45 N. H. 370.....	206
Luby v. Hudson River R. R. Co., 17 N. Y. 131.....	424

M.

McAden v. Jenkins, 64 N. C. App. 800.....	235
McAuley v. Western Vermont R. R. Co., 33 Vt.; 39 Id.....	49
McCluskey v. Cromwell, 11 N. Y. (1 Kern.) 593.....	293
McCready v. Railroad Co., 2 Strobb. (S. C.) 356.....	494
McDonald v. Snelling, 14 Allen (Mass.) 290.....	536
McDonald v. Western R. R. Corp., 34 N. Y. 497.....	349, 366
MacLae v. Sutherland, 25 E. L. & Eq. 114.....	114
McMahon v. Mayor, 33 N. Y. 647.....	415
McMillan v. Michigan Southern, &c. R. R. Co. 16 Mich. 80.....	326, 329, 341
Maham v. New York Central R. R. Co., 24 N. Y. 658.....	64
Mangan v. Brooklyn R. R. Co., 38 N. Y. 455.....	414, 416
Manley v. Gibson, 13 Ill. 398.....	62
Marble v. Worcester, 4 Gray (Mass.) 412.....	520
Marriott v. L. & S. W. R. Co., 1 C. B. (N. S.) 409.....	279
Martin v. Western Union R. R. Co., 23 Wis. 437.....	494, 506
Mason v. Woonsocket Union R. R. Co., 4 R. I. 377.....	12
Merchants' Union Exp. Co. v. Schier, 55 Ill. 140.....	330
Meyer v. North Missouri R. R. Co., 35 Mo. 353.....	450
Mid and R. Co. v. Brownley, 8 J. Scott, 372; E. C. L. 372, 382, note e.....	383
Miller v. Steam Nav. Co., 10 N. Y. 431.....	349, 365
Mills v. Michigan Central R. R. Co., 45 N. Y. 626.....	366
Milwaukee, &c. R. R. Co. v. Elbe, 4 Chand. (Mich.) 72.....	27
Minot v. Paine, 99 Mass. 106.....	219

	PAGE
Mississippi Central R. R. Co. v. Raiford, 48 Miss. 238.....	441
Mohawk, &c. R. R. Co. v. Clute, 4 Paige (N. Y.) 384.....	172
Moses v. Boston, &c. Railroad, 24 N. H. 71.....	267
Moses v. Pittsburg, &c. R. R. Co., 21 Ill. 516.....	63
Mumford v. Whitney, 15 Wend. (N. Y.) 384.....	78
Murphy v. Chicago, 29 Ill. 279.....	53
Murphy v. Deane, 191 Mass. 455.....	400
Murray v. Commissioners, 12 Metc. (Mass.) 457.....	37
Muschamp v. Lancaster R. Co., 8 Mees. & W. 421.....	325, 326

N.

Nashua Sack Co. v. R. R. Co., 48 N. H. 339.....	367
Naugatuck R. R. Co. v. Waterbury Button Co., 24 Conn. 468....	326
New Albany, &c. R. R. Co. v. O'Dailey, 12 Ind. 551.....	40
New England Exp. Co. v. M. C. R. R. Co., 57 Me. 188, 267, 266, 278	
New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344....	266, 339
Newson v. Railroad Co., 29 N. Y. 390.....	513
Nichols v. Lewis, 15 Conn. 136.....	56
Nicholson v. G. W. R. Co., 5 C. B. (N. S.) 366.....	279
Nicholson v. G. W. R. Co., 7 C. B. (N. S.) 755.....	279
Nicholson v. New York, &c. R. R. Co., 22 Conn. 83.....	64
Nicks v. Marshall, 24 Wis. 139.....	23
Nutting v. Connecticut River R. R. Co., 1 Gray (Mass.) 502....	326

O.

Ohio Life, &c. Co. v. Detroit, 16 How. 432.....	118
Ohio, &c. R. R. Co. v. Shanefelt, 47 Ill. 497.....	482, 483, 487
Ohio, &c. R. R. Co. v. Wheeler, 1 Black, 286.....	170
Olcott v. Banfill, 4 N. H. 537.....	266
Oldfield v. New York, &c. R. R. Co., 14 N. Y. 310.....	413
O'Mara v. Hudson River R. R. Co., 38 N. Y. 445.....	413
Oxlade v. N. E. R. Co., 1 C. B. (N. S.) 454.....	279

P.

Painter v. L. B. & S. C. R. Co., 2 C. B. (N. S.) 702.....	279
Palmer v. L. B. & S. C. R. Co., L. R. (6 C. P.) 194.....	279
Palmer v. L. & S. W. R. Co., L. R. (1 C. P.) 588.....	279
Pantam v. Isham, 1 Salk. 19.....	494
Parker v. G. W. R. Co., 7 Mann. & G. 253.....	278
Parkinson v. G. W. R. Co., L. R. (6 C. P.) 554.....	279

CASES CITED.

xvii

	PAGE
Passenger Cases, 7 How. 288.....	184, 188
Patterson, &c. R. R. Co. v. Stevens, 10 Am. Law Reg. N. S. 165...	56
Peaslee v. Gee, 19 N. H. 273.....	192
Pennsylvania Central R. R. Co. v. Schwarzenberger, 45 Pa. St. 208.	326
Pennsylvania R. R. Co. v. Kerr, 63 Pa. St. 363.....	497, 516
Penobscot Boom Corp. v. Lamson, 4 Shep. 224.....	206
People v. Assessors of Albany, 40 N. Y. 155.....	168
People v. Assessors of Brooklyn, 39 N. Y. 81.....	168
People v. Beardsley, 52 Barb. (N. Y.) 105.....	173
People v. Cassity, 2 Lans. (N. Y.) 294.....	173
People v. Chicago, &c. R. R. Co., 55 Ill. 111.....	251
People v. Fisher, 24 Wend. (N. Y.) 230.....	88
People v. Fredericks, 48 Barb. (N. Y.) 173.....	172
People v. Gaines, 47 Ill. 246.....	111
People v. Gallagher, 4 Mich. 244.....	89
People v. Kerr, 27 N. Y. 215.....	37, 40, 41
People v. Mitchell, 35 N. Y. 551.....	112
People v. Sturtevant, N. Y. 269.....	166
People v. Supervisors of Niagara, 4 Hill (N. Y.) 20.....	172
People v. Warfield, 20 Ill. 163.....	111
People v. Weant, 48 Ill. 263.....	111
People ex rel. Railroad Co. v. Salem, 9 Am. Law Reg. 437.....	95
Peoria, &c. R. R. Co. v. McIntyre, 39 Ill. 298.....	420
Perkins v. Lewis, 24 Ill. 208.....	110
Perley v. Eastern R. R. Co., 98 Mass. 414.....	494
Pervian v. Commonwealth, 5 Wall. 479.....	147
Pettyman v. Supervisors, 19 Ill. 406.....	110
Phelps v. Farmers' Bank, 26 Conn. 272.....	219
Phoenix Iron Co. v. Commonwealth, 9 P. F. Smith (Pa.) 104.....	223
Pickford v. G. J. R. Co., 10 Mees. & W. 399.....	278
Piddington v. S. E. R. Co., 5 C. B. (N. S.) 111.....	279
Piggot v. Eastern Counties R. Co., 54 Eng. Com. Law, 228.....	383, 481, 494
Pitkin v. Long Island R. R. Co., 2 Barb. (N. Y.) 221.....	77
Pomeroy v. Railroad Co., 16 Id. 640.....	88
Powell v. Deveney, 3 Cush. (Mass.) 300.....	538
Pratt v. Bowen, 3 Wis. 612.....	119
Presbyterian Soc. v. Auburn, &c. R. R. Co., 3 Hill (N. Y.) 567..	64
Presbyterian Soc. v. Railroad Co., 3 Hill (N. Y.) 567.....	88
Price v. Powell, 3 Cow. 322.....	315
Provident Bank v. Massachusetts, 6 Wall. 611.....	131

Q.

Queen v. Inhabitants of Ely, 69 E. C. L. 483.....	63
---	----

	PAGE
R.	
Railroad v. Davidson County, 1 Sneed, 692.....	111
Railroad Co. v. Ogier, 35 Pa. St. 60.....	513
Railroad Co. v. Truitt, 24 Ind. 162.....	472
Ransome v. E. C. R. Co., 1 C. B. (N. S.) 437.....	279
Ransome v. E. C. R. Co., 4 C. B. (N. S.) 135.....	279
Ransome v. E. C. R. Co., 8 C. B. (N. S.) 709.....	279
Raphael v. Railway Co., Law Rep. 2 Eq. Cas. 37	83
Rerick v. Kern, 14 Serg. & R. (Pa.) 267.....	74
Rex v. Gardner, Cowp. 79.....	170
Rex v. Herndon-on-the-Hill, 4 M. & S. 565.....	78
Riley v. Horne, 5 Bing. 217	266
Robbins v. Milwaukee, &c. R. R. Co., 6 Wis. 636	27
Robertson v. Dodge, 28 Ill. 161.....	394
Robertson v. Rockford, 21 Ill. 451.....	110
Robins v. Railroad Co., 6 Wis. 641.....	119
Rochester, &c. R. R. Co. v. Budlong, 6 How. (N. Y.) 467.....	27
Rogers v. Burlington, 3 Wall. 663.....	110
Rome R. R. Co. v. Sullivan, 25 Ga. 228.....	326
Rood v. New York, &c. R. Co., 18 Barb. (N. Y.) 80.....	482
Root v. Great Western R. R. Co., 45 N. R. 524.....	326
Royal British Bank v. Turquand, 5 Ell. & Bl. 259.....	113
Rusher v. Sherman, 28 Barb. (N. Y.) 416.....	166
Ryan v. New York Central R. R. Co., 35 (N. Y.) 210.....	482, 497, 517
S.	
Sandford v. Railroad Co., 24 Pa. St. 378.....	279
Sanford v. Railway Co., 14 Pa. St. 378	266, 278
Sargent v. Ohio, &c. R. R. Co., 1 Handy (Ohio) 52.....	40
Schneider v. Evans, 25 Wis. 241.....	249, 360, 362
Schuykill Nav. Co. v. Farr, 4 Watts & S. (Pa.) 375.....	27
Schuykill Nav. Co. v. Thorburn, 7 Serg. & R. (Pa.) 411.....	27
Scott v. London Docks Co., 3 H. & C. 596.....	388
Sharpless v. Philadelphia, 21 Pa. St. 157.....	91
Sheldon v. Hudson River R. R. Co., 14 N. Y. 212.....	482
Sheldon v. Robinson, 7 N. H. 157.....	266
Sherwood v. Saratoga, &c. R. R. Co., 15 Barb. N. Y. 650.....	171
Shore v. Wilson, 9 Clark & F. 556.....	192
Smith v. Hannibal, &c. R. R. Co. 37 Mo. 187.....	482
Smith v. London, &c. R. R. Co., L. R. 5 C. P. 98.....	494, 538
Snyder v. Western Union R. R. Co., 25 Id. 60.....	27
Society for Savings v. Coite, 6 Wall, 594.....	131
Soens v. Racine, 10 Wis. 280.....	120

	PAGE
Springfield v. Connecticut R. R. Co., 4 Cush. (Mass.) 63.....	64
Squire v. New York Central Railroad Company, 98 Mass. 229....	316
Stanton v. Ellis, 12 N. Y. 575.....	166
State v. Baltimore, &c. R. R. Co., 24 Md. 84.....	384
State v. Krebs, 64 N. C. 604.....	234
State v. Mayor, 37 Mo. 272.....	111
State <i>ex rel.</i> Attorney General v. Kennon, 7 Ohio St. 546.....	96
Stearns v. Old Colony, &c. R. R. Co., 1 Allen (Mass.) 493.....	461
Street Railway v. Cumminsville, 14 Ohio St. 523.....	37, 39, 40
Strohn v. Detroit, &c. R. R. Co., 23 Wis. 126.....	23
Sturgis v. Miller, 31 Vt. 1.....	51
Supervisors v. Schenck, 5 Wall. 783.....	113
Sutton v. G. W. R. Co., 3 H. & C. 800.....	279
Swartz v. Swartz, 4 Barr (Pa.) 353.....	74
Sweet v. Barney, 23 N. Y. 335.....	315
Sweet v. Hulbert, 51 Barb. (N. Y.) 315.....	98
Swett v. Cutts, 11 Am. Law Reg. N. S. 11.....	45
Swift v. Poughkeepsie, 37 N. Y. 511.....	107, 178

T.

Talbot v. Dent, 9 B. Monr. (Ky.) 526.....	111
Tate v. Ohio, &c. R. R. Co., 7 Port (Ind.) 480.....	64
Thallhiener v. Brinkerhoff, 4 Wend. (N. Y.) 396.....	424
Thomas v. Winchester, 2 N. Y. 48.....	525
Thomas v. Winchester, 6 N. Y. 397.....	541
Thompson v. Lee County, 3 Wall. 327.....	111, 112
Thompson v. Milwaukee, &c. R. R. Co., 2 Am. Railw. Rep. 9....	18
Thoroughgood v. Bryan, 8 C. B. 115.....	402
Todd v. Old Colony, &c. R. R. Co., 7 Allen (Mass.) 207.....	400
Titcomb v. Fitchburg R. R. Co., 12 Allen (Mass.) 254.....	429
Titus v. Northbridge, 97 Mass. 258.....	429
Tremantle v. London, &c. R. R. Co., 100 Eng. Com. L. 88.....	494
Troy, &c. R. R. Co. v. Potter, 42 Vt. 272.....	49
Turberville v. Stampe, 1 Ld. Raym. 264; 1 Salk. 13.....	494

U.

United States Ex. Co. v. Rush, 24 Ind. 408.....	326
---	-----

V.

Van Rensselaer v. Witbeck, 7 N. Y. 517.....	174
Van Santvoort v. St. John, 6 Hill (N. Y.) 3, 15/.....	326
Vaughan v. Menlove, 7 Carr. & P. 525.....	494
Vaughan v. Taff Valley R. Co., 3 Hurl. & N. 743.....	499, 512, 514

	PAGE
Vaughan v. Taff Vale R. Co., 5 Hurl. & N. 679.....	489
Vicksburg, &c. R. R. Co. v Patton, 31 Miss. 176.....	441
Vincent v. Chicago, &c. R. R. Co., 49 Ill. 33.....	251

W.

Wager v. Railroad Co., 25 N. Y. 526.....	38
Walker v. Caywood, 21 N. Y. 60.....	87
Ward v. Jefferson, 24 Wis. 342.....	471
Waring v. Mayor, 8 Wall. 123.....	147
Warren v. Fitchburg R. R. Co., 8 Allen (Mass.) 217.....	400, 408
Watson v. Mercer, 8 Pet. 111.....	111
Webb v. Rome, &c. R. R. Co., 3 Lans. (N. Y.) 453.....	532
Webster v. Atkinson, 4 N. H. 21.....	192
Weisenburg v. Appleton, 26 Wis. 56.....	544
Welch v. Milwaukee, &c. R. Co., 2 Am. Railw. Rep. 1.....	27
West v. L. & N. W. R. R. Co., L. R. (5 C. P.) 622.....	279
Whiting v. Fond du Lac County, 25 Wis. 188.....	116
Whiting v. Sheboygan R. Co., 9 Am. Law Reg. 156.....	94
Whitney v. Thomas, 23 N. Y. 281.....	165, 167
Weir v. St. Louis, &c. R. R. Co., 48 Mo. 558.....	450
Wilcox v. Jackson, 18 Pet. 511.....	166
Williams v. New York Central R. R. Co., 16 N. Y. 97.....	37, 64
Williams v. Railroad Co., 4 Cush. (Mass.) 63.....	38
Wood v. Crocker, 18 Wis. 345.....	348
Wood v. Leadbitter, 18 Mees. & W. 838.....	78, 79
Wood v. Railway Company, 27 Wis. 541.....	354, 358, 359, 368
Woodruff v. Parham, 8 Wall. 123.....	140, 148
Worcester v. Railroad Co., Metc. (Mass.) 556.....	123
Wright v. Warren, 4 Deg. & S. 367.....	219
Wunderlick v. Cumberland Valley R. R. Co., Pa. St. ..	75
Wynehammer v. People, 13 N. Y. 391.....	89

Y.

York Company v. Central Railroad, 8 Wall. 107.....	315, 320, 339
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AMERICAN RAILWAY REPORTS.

WELCH v. THE MILWAUKEE & ST. PAUL RAILWAY COMPANY.

27 Wisconsin, 108.

Supreme Court of Wisconsin; June Term, 1870.

Compensation for land taken for railway purposes. The true basis for estimating the damages to be allowed for the taking of land of a private individual by a railway company for the construction of their road, is the actual situation of the land, and the use to which it was applied and intended to be applied by the owner. The division of the property into lots and blocks upon a map, or the separation of one portion from the remainder by a street, is not ground for restricting the damages to compensation for the injury to the lots of which part is actually taken.

A tract of land within the limits of a city had been laid out into lots, which were acquired by the owner at different times, but the whole was used by him as one tract for agricultural purposes. A strip of land from some of the lots, separated by a public street from the larger portion of the tract, having been taken by a railway company for their road,—*Held*, that the owner was entitled to compensation for the injury to the whole property, and not merely for the injury to the separate lots over which the railroad was built.

Appeal to the supreme court of Wisconsin from the circuit court for Dane county.

Hopkins & Foote and George B Smith, for appellant.

Welch v. Milwaukee, &c. R. Co.

Welsh & Botkin, with *William F. Vilas*, of counsel, for respondent.

DIXON, Ch. J.—This was an appeal to the circuit court of Dane county from the appraisement of commissioners appointed under the charter of the railway company to assess the damages sustained by the plaintiff by reason of the taking of certain lands of his by the company for right of way. In the circuit court there was a verdict and judgment for the plaintiff, from which the company appeals.

The facts of the case, upon which the questions of law arise, are thus succinctly stated in the brief of the learned counsel for the company:

The plaintiff was the owner of certain lots in the city of Madison, upon which he resided. He was also the owner of certain other lots, in another block across the street from his residence, through which the railroad runs, and upon which it became necessary to raise an embankment some eight or nine feet high, by which he was without a road over or under the track, and was greatly impeded in the use of the land which lay the other side of the track and embankment. The lots across which the railroad ran were four in number, containing about eleven acres, and worth, according to the testimony of the plaintiff, from two to five hundred dollars per acre—according to the testimony of others, much less. The lots where the plaintiff lived, on the other side of the street in another block, are six in number, and contain about nine acres of land. The company objected to any evidence showing the value of the property across the street where the plaintiff resided; but the court overruled the objection, and allowed evidence as to the value of the plaintiff's home place, together with the value of the lots across which the railroad ran. And the court refused to allow the company to prove the value of the land actually taken for the road.

Welch v. Milwaukee, &c. R. Co.

The company requested the court to charge the jury as follows: "The land taken being across lots deeded and laid out in the city, and separated from the other lots of the plaintiff by a street, so that they do not adjoin his other property and lots, the defendants are not liable for any supposed damages that the plaintiff may sustain to his other lots or property thus situated, by reason of taking and using the strip across the lots through which the railroad passes."

This instruction was refused, and in place thereof the following, as part of the general charge, was given:

"I have charged you, as requested by defendant's counsel, that lots in a city are not generally supposed or intended to be used for agricultural purposes; nor is the value usually determined by such rule—their value being generally estimated and established according to their eligibility for business or building purposes. But it is not necessarily so in reference to all land included in the city limits of a city of ten or twelve thousand inhabitants, as large in territorial extent, perhaps, as some of the largest cities in the country. A party may use, in connection with his residence, a number of acres: Persons very frequently do so within the city limits of the largest cities; but when land lying in a body is so used in connection with a residence, it is not two distinct tracts, even if a highway pass through it, no more than a farm having a highway passing through it is two farms; nor, because it may consist of more than one lot, and have been purchased by the owner and resident upon it at different times and in different parcels—especially when, as in this case, as General Mills and all the witnesses testifying on the point, as I remember the evidence, say, the part below the road was worth more as part of the place, than it would have been separate."

Such are the facts. and such the propositions of law

Welch v. Milwaukee, &c. R. Co.

involved, as stated in the brief of counsel, which is quite sufficient, save only as to the additional facts, which are rather assumed than stated, because there was no controversy with respect to them, that the lots of the plaintiff are situate on the confines of the city, where the residences are not numerous, and where the land, or nearly all of it, like that of the plaintiff, is entirely devoted to the purposes of agriculture. It is proper likewise to observe, what appears from the plat or map given in evidence, that the lots as laid out seem designed quite as much, if not more, for the purpose of tillage and cultivation than for any other. They are lots of the kind designated in the legislation of this state as "out lots," and distinguished from "in lots," which are only those properly intended for city or village residences and for business, by being very much larger, and usually so planned or laid out with reference to streets and other accommodations as to be incapable of convenient use or occupation by more than a single resident, by whom the greater part must be employed for agriculture, or otherwise put to no valuable use at all. Such are the lots in question, each one of which is from twelve to fifteen times larger than the "in lots," or residence and business lots proper. They are property of a mixed nature, but more agricultural than anything else. They were intended to be chiefly used in husbandry, and for the raising of crops on a small scale—as a kind of suburban farming lands, not uncommon on the borders of our large towns and villages.

These considerations, in connection with the use which was actually made of the lots by the plaintiff, seem to go very far towards verifying the correctness of the rules laid down by the learned judge of the court below for the guidance of the jury, and to show that the method adopted for estimating the damages sustained by the plaintiff was the proper one. The

Welch v. Milwaukee, &c. R. Co.

objection to that method is, that the property is city lots, and not designed for agriculture, and that in determining the damages, the injury to each lot should be considered by itself, and with reference to any separate use which might be made of it, or at all events, that the injury or depreciation in value of the property of the same owner upon the opposite side of the street cannot be taken into the account. The effort is to disconnect these several lots and the use which was made of them by one owner, as a single tract or parcel of land for the purpose of agriculture, and to treat them as so many distinct lots owned by different persons, or as if those on one side of the street, over which the railroad runs, were owned by one man, and those on the other side by another. The injustice of such a rule, were it the rule prescribed by law, as applied to the present plaintiff's case, is manifest from the testimony taken on the trial, to which allusion was made by the judge in his charge. All the witnesses concurred in saying that the injury to the plaintiff was greater than if he had owned and cultivated only the lots across which the road passed; that the benefits of which he has been deprived, or the loss which he has sustained, are very considerably enhanced by reason of the use which he made and intended to make of the land in question in connection with that across the street where his dwelling house and other buildings are located. The inquiry, therefore, is, whether the plaintiff is to be deprived of these benefits and suffer this loss which the jury have found, without compensation, merely because the lands which he thus owned and occupied for agricultural purposes, and which in reality constituted but one body or tract divided only by the street in which the public had a mere easement, happened to be laid out into lots and blocks, a circumstance which did not at all interfere with or prevent the beneficial use and enjoyment by the

Welch v. Milwaukee, &c. R. Co.

plaintiff in the manner stated. In other words, the question is, whether we are to look to the map to ascertain the plaintiff's damages, or to the land itself, and the actual situation of it, and the use to which it was applied and intended to be by the plaintiff. It seems to us that the latter constitutes the true ground or basis for estimating the damages. The division of the property into lots and blocks upon the map, and the appropriation of a portion of it for a street, were, so far as the plaintiff is concerned, and his use and the injuries he has sustained, purely accidental circumstances. They did not obstruct the use nor mitigate the injuries. It appears from the printed case that the plaintiff acquired the property for the use to which it was applied, and in consideration of its value and the advantages to himself as owner of the adjoining property across the street where he resided. He acquired it after it was laid out into lots, and at different times, and probably from different owners of distinct lots. The fact that he thus purchased the lots, and the purposes for which he purchased and used them, seem to us to bear very strongly on the question under consideration. It was, as we have seen, no diversion of them to a use not intended by the proprietor who made and acknowledged the plot, even supposing that could have made any difference. It was, as suggested in the charge of the judge, no more than if a farm in the country were intersected by a highway, or than if it were composed of ten contiguous forty-acre tracts of land, that being the smallest government subdivision, and the railroad should cross one or more of them, or (to make the case exactly parallel) four of them, and it should be insisted that the damages be assessed with reference to the injury to those four alone, and without considering any loss actually sustained by the owner in consequence of being deprived of their use in connection with the others. We venture to say that the

Welch v. Milwaukee, &c. R. Co.

rule contended for here would hardly be urged in such a case ; and yet the difference between the cases is not appreciable to our minds. If it cannot be said that a farmer in the country has no right to acquire ten forty-acre tracts of land, one at a time though it may be, and appropriate them to use as one farm, and claim damages for the injury to the whole, then we do not see how it can be said to have been incompetent for the plaintiff to have acquired title to the lots in question and appropriated them to use in the manner shown, and to claim compensation for the injury to his property as a whole. There exists, in our judgment, no sound basis for a distinction ; and we must accordingly hold that the learned judge of the circuit court was right in rejecting the instruction asked for the company, and in giving that to which exception was taken.

The damages in such cases must always very much depend upon the use to which the property is appropriated, and its situation and value with reference to other property of the same owner with which it is connected in use ; and that rule of assessment or valuation would seem to be the only true one which makes compensation go hand in hand with the actual loss or injury sustained by the person whose land is thus taken. People may do what they will with their own. This is the essential idea of property. And whilst speculative damages cannot be allowed, yet actual damages—its value to the owner, his use being considered—must always be. And in such case it will not do to say, if the land was separately owned, or separately used, or intended for some other purpose, or belonged to some one else, the damage would be so much the less, and therefore no more can be recovered. The actual use and intention of the proprietor, together with all surrounding circumstances, must be considered. If, for example, it had appeared in the present case that the plaintiff acquired the lots for some different

Welch v. Milwaukee, &c. R. Co.

object, as to sell again, not using nor intending to use them in connection with the land on the other side of the street where he resides, as together constituting a single tract or parcel of land for agricultural purposes, or if it had appeared that he owned the land originally, and had laid it out into lots, holding them for sale, then a different rule of damages might have prevailed. As it is, however, we are quite satisfied, for the reasons thus imperfectly stated, that the rule held by the court below was the correct one, and that the verdict and judgment ought not to be disturbed.

Objection is also taken in the brief of counsel for the company, that the plaintiff was allowed to give evidence of the separate value of the four lots across which the railroad runs, and that the company was not allowed to refute that evidence or give any proof on the subject. It appears from the bill of exceptions that the plaintiff, when first called to the stand as a witness, testified to the value per acre of the four lots in question. This was, of course, without objection on the part of the company, as it was with reference to the value or injury of those lots alone that the company insisted the damages should be estimated. Immediately upon the question being raised and discussed whether the rule should be the damages to the property of the plaintiff as a whole, the court decided that it should, and as we hold correctly, and thereafter the testimony was directed and limited to the issue thus presented, and all evidence of the separate value of the four lots excluded. It is manifest from the entire evidence, as well as from the position taken and attempted to be maintained for the company, that no injury resulted to the company from the admission of the testimony, or from the refusal to allow the company to rebut it. The damages were not increased by reason of it, or the verdict for a greater sum than it would otherwise have been. In fact, the course of subsequent investigation

Thompson v. Milwaukee, &c. R. Co.

was such, that this testimony was entirely lost sight of. It was neither considered by the court nor the jury, and could have had no influence upon the verdict.

It follows from these views that the judgment of the circuit court must be affirmed.

PAINE, J., did not sit in this case.

BY THE COURT.—Judgment affirmed.

THOMPSON v. MILWAUKEE & ST. PAUL
RAILWAY COMPANY.

27 Wisconsin, 98.

Supreme Court of Wisconsin; June Term, 1870.

Compensation for land taken for railway purposes. In an action for damages to plaintiff's land from the construction of a railroad over it by defendant, the fact was conceded that the excavation of the road had rendered a retaining wall necessary for the protection of plaintiff's lot. The defendant offered to show that its engineer had been directed to construct such a wall, for the security of the road-bed, and that materials were provided, and the work about to be commenced. *Held*, that this evidence was properly excluded. Inasmuch as the charter of the railway company required it to compensate the owner of land taken, for all damage sustained by him by reason of the taking and using his land, evidence which could tend only to diminish the compensation for damages admitted to have already resulted to the plaintiff was not admissible.

The offer of a stipulation by defendant, in connection with such evidence, that if the retaining wall was not built, the verdict should not affect plaintiff's right to recover, in another action, the cost of building such wall, did not alter the case. The plaintiff could not be turned over to another action, for the recovery of damages which had already resulted to his lot from the construction of defendant's road.

Thompson v. Milwaukee, &c. R. Co.

Appeal to the supreme court of Wisconsin from the circuit court of Dane county.

This was an action for damages to plaintiff's land, caused by the construction of a railroad over it by the defendant. Plaintiff's lot abutted upon a lake, and defendant, in excavating the road-bed, cut away part of the bank, so that a wall became necessary to retain and preserve the bank of the lot thus altered. Upon the trial, defendant offered evidence tending to show that such a wall was necessary for the security of its road-bed, and that it intended and was preparing to build the wall; which was excluded. The value of the land actually taken was found by the jury to be twenty-five dollars; and the damages to the rest of the land to be three hundred dollars, of which one hundred was allowed as the cost of building the necessary wall. Motions by defendant for a new trial, and that there be inserted in the judgment a direction that plaintiff should recover only two hundred and twenty-five dollars, if defendant should build the retaining wall, and that, to enable defendant to build such wall, the collection of the one hundred dollars allowed therefor should be stayed, were denied. The defendant appealed.

Hopkins & Foote and George B. Smith, for appellant.

Gregory & Pinney, for respondent.

COLE, J.—We do not think there was any error in excluding the evidence offered on the part of the defendant. The offer was to show that it was necessary for the security of the road-bed, and the safe operation of the road, for the company to construct on the bank of the plaintiff's lot a retaining wall; that the company had instructed its engineer to construct such a

Thompson v. Milwaukee, &c. R. Co.

wall to protect the plaintiff's lot, had got the stone ready for the purpose, and was about to do the work. Now what could have been the object of this testimony? Obviously to lessen the plaintiff's damages by the amount which it would cost to build this retaining wall. And yet it was a conceded fact that a retaining wall was necessary to protect the plaintiff's lot from injury. The charter of the company requires it to pay the value of the land taken for the use of its road, and also the damage or injury which the owner shall or may sustain by reason of the taking and using his land for that purpose. *Prio. & L. Laws of 1860*, ch. 75. In consequence of the company running its road across the plaintiff's lot in the manner it did, it became absolutely necessary, for the protection of his property from further injury, to build and keep up a retaining wall. This was a part and parcel of the damages which he had sustained by reason of the taking of his property. It is true, it was proposed to show that a retaining wall was necessary for the security of the road and its safe operation by the company. But it appeared that several daily trains had been regularly run over the whole length of the road for a period of five months when the trial was had. The company might continue to operate its road without the retaining wall, as it had done. And yet, because the witness, who was a foreman in charge of the work of the company, might think a retaining wall necessary for the safety of the road, and because the company had instructed its engineer to build such a wall on the bank of the plaintiff's lot, and materials had been provided for the purpose, it was proposed to diminish the compensation for damages which had already resulted to the plaintiff from the taking of his land, by the amount which it would cost to build the retaining wall. We are at a loss to perceive upon what legal principle such a claim for the reduction of the plaintiff's damages can

Thompson v. Milwaukee, &c. R. Co.

be sanctioned. The case of *Mason v. Woonsocket Union R. R. Co.*, 4 R. I. 377, is referred to as sustaining the position that the company should be allowed the expense of building the wall. But that case is clearly distinguishable from the one before us. In that case, where the damages were assessed prospectively, and before the road was built, for injuries to land located by a railroad track, it was held competent for the company to show by experts the necessity upon the company to place a culvert through its embankment at a particular point to save the embankment, by way of answer to a claim for damages, on account of the prospective stopping up of certain drains at the same point by the embankments of the road, which drains were necessary to free the land of the claimant from water. From such evidence the jury might presume that if the embankment was made at all, it would be provided with the necessary culverts, so that the water would be carried off the claimant's land as effectually as by the drains he himself had constructed. In this case it is not prospective damages which are assessed arising from some assumed manner of building the road. The road has been built, the plaintiff's land has been taken for the use of the road; and in consequence it is necessary for the protection of his property that a retaining wall should be constructed. In the language of the charter, it is a part of "the damage or injury which the owner has sustained by reason of the taking and using his property by the company."

It is true, the defendant further offered to file, in connection with this proof, a stipulation that it would build a retaining wall along the plaintiff's lot, and that the verdict in the case should not affect, bar, or impair his right to recover the expense of building the wall in another action in case the defendant did not build it. But it is manifest that this was merely denying the plaintiff the right to recover the damages which the

Thompson v. Milwaukee, &c. R. Co.

law gave him in consequence of the taking of his land and the construction of the road across his lot, and turned him over to another action in case the company did not build the wall. The plaintiff, however, was entitled to recover the whole amount of damages which he had sustained, without the expense of another lawsuit. Upon a proper application it might have been a reasonable exercise of discretion on the part of the circuit court to have made a special direction in the judgment, that, in case the company built a proper retaining wall within a brief period, then the collection of one hundred dollars—the amount which the jury found it would cost to construct the wall—should be stayed. I very much doubt about the company being entitled to any such direction in the judgment as a strict matter of right, but it might not have been an unwarranted exercise of discretion on the part of the court to have made it. The company did ask for a new trial because the verdict was against the evidence, and for a special direction in the judgment that if the company built the retaining wall the plaintiff should only recover two hundred and twenty-five dollars, and that the collection of the one hundred dollars be stayed in order to enable it to construct the wall. This motion was denied, and properly so. There was no ground for granting a new trial. And the company did not stipulate any time within which it would build the wall, providing the court would stay the collection of the one hundred dollars. The court certainly would not have been justified in granting such a stay indefinitely. It should only have granted it upon condition that the company constructed the wall within a reasonable time. And the company should have accompanied its motion for a stay with a stipulation that if the stay was granted it would build a suitable retaining wall within a definite time, or such period as the court might fix in its order. But no such proposition was made upon

Price v. Milwaukee, &c. R. Co.

the motion, and the court was clearly right in refusing to grant the special direction asked by the company.

On the whole case we think the judgment is right and must be affirmed.

PAINE, J., did not sit in this case.

BY THE COURT.—Judgment affirmed.

**PRICE v. THE MILWAUKEE & ST. PAUL
RAILWAY COMPANY.**

27 Wisconsin, 93.

Supreme Court of Wisconsin, June Term, 1870.

Compensation for land taken for railway purposes. In an action for damages to plaintiff's land from the construction of a railroad over it by defendant, the fact was conceded that the excavation of the road had rendered a retaining wall necessary for the protection of plaintiff's lot. The defendant offered to show that its engineer had been directed to construct such a wall, for the security of the road-bed, and that materials were provided, and the work about to be commenced. *Held*, that this evidence was properly excluded. Inasmuch as the charter of the railway company required it to compensate the owner of land taken, for all damage sustained by him by reason of the taking and using his land, evidence which could tend only to diminish the compensation for damages admitted to have already resulted to the plaintiff was not admissible.

The offer of a stipulation by defendant, in connection with such evidence, that if the retaining wall was not built, the verdict should not affect plaintiff's right to recover, in another action, the cost of building such wall, did not alter the case. The plaintiff could not be turned over to another action, for the recovery of damages

Price v. Milwaukee, &c. R. Co.

which had already resulted to his lot from the construction of defendant's road.

Under such a provision in the charter of a railway company, the damages recoverable by an owner of land across which the road was constructed, who had placed certain fixtures upon the premises to adapt them to use as a water-cure, may properly include the difference between the value of such fixtures while connected with the property as a water-cure, and their value when removed and applied to other uses; where the construction of the railroad across the premises is shown to have rendered them unfit for use as a water-cure.

Appeal to the supreme court of Wisconsin from the circuit court for Dane county.

This case came before the court in the same manner as the preceding, and involved the same questions, arising out of a similar state of facts. Upon the trial in the court below of the appeal by plaintiff from the award of the commissioners appointed to estimate the damages to his land from the construction of defendant's road, the defendant, as in the preceding case, offered to show its readiness and intention to construct the retaining wall necessary to protect the plaintiff's land from the lake, the bank having been cut away by defendant's excavations; and likewise offered to stipulate that if it did not build the wall the verdict should not impair the right of plaintiff to recover the cost of building it, in a direct action for that purpose. The offer was refused.

On the part of the plaintiff evidence was given of the value of the strip of land actually taken, and the damage resulting to the remainder of the land, as usual. In addition, the plaintiff was allowed to testify that he had fitted the premises for a water-cure by sinking a well and putting pipes, boilers, and other fixtures into the buildings; and was also permitted to show the cost of such fixtures, and that the premises were rendered unfit for the purposes of a water-cure by

Price v. Milwaukee, &c. R. Co.

the construction of defendant's road. Objections by defendant to this evidence were overruled.

The court instructed the jury, 1. That they must first determine the value of the strip of plaintiff's land taken by defendant, at the time of such taking. 2. That they must next determine the damage done to the rest of the land by defendant's taking and using said strip. 3. That the owner of the land was entitled to compensation for any depreciation in the value of such residue thereof caused by defendant's taking and using said strip. 4. That in estimating such damage they might determine the market value of said residue before the company took the strip, without reference to the fixtures and appurtenances for the water-cure, and its market value afterwards, and the depreciation in value by reason of the road would be the measure of damages without reference to such fixtures and appurtenances. 5. That if, before proceedings by defendant to condemn the right of way, plaintiff had put upon the premises certain fixtures and appurtenances necessary to fit them for a water-cure, and if, by reason of the construction and use of the road across the premises, they became unfit for that use, the jury should also allow in damages the difference between what those fixtures and appurtenances were worth in connection with the property as a water-cure (not exceeding their reasonable cost), and what they were worth to be removed from the premises and applied to other uses. . . . 8. That if they assessed damages in plaintiff's favor, they should state what portion thereof, if any, was for loss sustained in reference to the fixtures and appurtenances placed on the premises by plaintiff to fit them for a water-cure; and also what portion, if any, was for the cost of making the wall or other protection of the shore bank of the premises.

At defendant's request the court gave the following instructions: "1. You are not to allow plaintiff any

Price v. Milwaukee, &c. R. Co.

damages on the ground that the road has destroyed or affected the property as a water-cure. I have rejected the evidence offered by defendant tending to show the business of the institution as a water-cure, and its value as such, and you cannot now consider that question. All that plaintiff claimed was for the value of the fixtures that have been rendered useless by the road. 2. Defendant is not liable in this proceeding for injury or damage to plaintiff's business as a physician or water-curist. The measure of damages is the difference between the value of the property before and since the road was built and operated."

The jury rendered a verdict for the plaintiff, finding the value of the strip of land taken to be fifty dollars and the damages to the remainder of the property to be one thousand dollars, of which three hundred and fifty dollars were allowed for loss upon the fixtures and appurtenances added to the property for water-cure purpose, and one hundred and fifty dollars were allowed as the cost of building the retaining wall. A motion by the defendant for a new trial was denied. The defendant appealed.

After entry of judgment the plaintiff filed a remittitur of the amount allowed him as the cost of the necessary retaining wall, to take effect provided the defendant erected the wall by a specified date, several months after judgment was rendered.

Hopkins & Foote and George B. Smith, for appellant.

Spencer, Lamb, & Spooner, for respondent.

COLLIER, J.—In this case, after the judgment was entered, the plaintiff filed a remittitur of one hundred and fifty dollars, included in the damages by the jury as the cost of constructing a necessary retaining wall

Price v. Milwaukee, &c. R. Co.

along his lot, to protect it from further injury and to restore the bank to its former condition; this remittitur to take effect providing the company should construct such wall by July 1, 1870. All the testimony upon the point went to show that such a wall was absolutely necessary, and the cost of it was beyond all question a proper item of damages. The company, however, offered to show that a wall was necessary for the security of its road, bed and the safe operation of the road, and that it had instructed its engineer to construct such a wall along the bank, and had procured the necessary material for that purpose. In the case of Thompson against this same defendant (*ante*, p. 9), we have held that such testimony was not legitimate and proper to go to the jury for the purpose of diminishing the amount of damages which a party was entitled to recover by reason of the taking and using of his land by the company. The expense of constructing this wall was a legitimate element to be considered in estimating the plaintiff's damages, and it was no defense to show that it might be equally necessary for the security of the road. The fact appeared that the road had been built, and trains were running regularly over it. And when the plaintiff remitted the expense of building the wall, providing the company performed the work within seven months, it was all and more than the defendant was entitled to ask as a matter of strict legal right. *Thompson v. Milwaukee & St. Paul R. R. Co.*, *ante*, p. 9.

We perceive no valid objection to the instructions which the court gave in regard to the general rules to be observed by the jury in the assessment of plaintiff's damages. They are so obviously just and well-founded in sound legal principles, as really to require no comment or vindication. It appeared that the plaintiff had placed certain fixtures upon the premises, to adapt his property to use as a water-cure. The court, at the

Price v. Milwaukee, &c. R. Co.

request of the defendant, told the jury that in considering the damages, they were not to allow anything to the plaintiff on the ground that taking the property by the company had destroyed or affected the residue of the premises for the use of a water-cure. And the court also, at the request of the plaintiff, instructed the jury that if they found that before proceedings were taken by the railroad company to condemn the right of way, the plaintiff had put into and upon the premises certain fixtures and appurtenances necessary to them for a water-cure, and that by reason of the construction and use of the railroad across the premises, the premises became unavailable and unfit for that use, then they were to allow in the damages the difference between what these fixtures and appurtenances were worth in connection with the property as a water-cure (not exceeding their reasonable cost), and what they would be worth to be removed from the premises and applied to other uses.

The charter of the company in the clearest manner recognizes the principle that the company must pay the price of the land taken and all consequential damages caused the land-owner by constructing the road across his land. *Prto. & L. Laws of 1860*, ch. 75, § 5. And if the defendant entered upon the plaintiff's premises in such a way as to destroy the fixtures he had put upon them for use as a water-cure, he was entitled to compensation. The rule laid down in the above instruction is very favorable for the company.

It is claimed that whether the fixtures were valuable as appurtenances to a water-cure, depended essentially upon the question whether the institution itself was valuable. But suppose it had appeared that the water-cure was very flourishing and profitable, what then would have been the rule of damages? But without going into any general reasoning upon the point, it is enough to rest the question upon the language of the

Bigelow v. West Wisconsin R. Co.

charter just cited. That requires the company not only to pay the value of the land actually taken for the use of its road, but also the damage or injury which the owner shall sustain or may sustain by reason of such taking. Manifestly the company had no right to destroy the fixtures of the water-cure without making some compensation therefor.

There are some other points discussed upon the brief of the counsel for the defendant, but we do not think they require any special notice. No error has intervened in the proceedings which would warrant a reversal of the judgment.

PAINE, J., did not sit in this case.

BY THE COURT.—Judgment affirmed.

**BIGELOW v. THE WEST WISCONSIN
RAILWAY COMPANY.**

27 Wisconsin, 478.

Supreme Court of Wisconsin; January Term, 1871.

Compensation for land taken for railway purposes. Where the constitution of a State provides that "the property of no person shall be taken for public use without just compensation therefor" (*Wis. Const.* art. 1, § 18), a railway charter which simply makes provision for an appraisal and award of "the value of the land taken," and is silent as to compensation for damages resulting to land of the same owner and part of the same tract, not taken by the railway company, must be construed to mean that a "just compensation" shall be awarded for the land taken: otherwise the charter would be void for repugnance to the constitution.

Bigelow v. West Wisconsin R. Co.

The "just compensation" for property taken for public use required by such a constitutional provision, consists in paying to the owner not only the value of the portion of the property actually taken, but also the amount of the diminution in value of the portion not taken.

Thus, where a person owned a quarter-section of land, part of which was taken under the provisions of such a charter for the construction of a railroad,—*Held*, that in an action against the railway company for taking his land, he might show the diminution in value of the entire quarter-section, resulting from the construction of the railroad, although the road was located wholly upon one "forty" of the quarter-section.

Appeal to the supreme court of Wisconsin from the circuit court for Trempealeau county.

The history of the case, and the facts out of which the questions involved arose, are stated in the opinion.

George Graham, for the appellant.

Montgomery, Tyler, & Dickinson, for the respondent.

LYON, J.—[After disposing of a motion involving a question of practice.]—The defendant, the railway company, located and constructed its line of railway across certain lands of the plaintiff in the county of Monroe, and procured an appraisement and award of the damages resulting therefrom to the plaintiff to be made by commissioners appointed for that purpose pursuant to the provisions of its charter. From such award the plaintiff duly appealed to the circuit court for that county. The case was removed to the circuit court for Trempealeau county, and there tried. The jury assessed the plaintiff's damages at four hundred and twenty-five dollars, for which sum and costs judgment was rendered against the defendant, who appealed therefrom to this court.

Bigelow v. West Wisconsin R. Co.

Various exceptions were taken during the trial to the rulings of the court admitting testimony offered by the plaintiff. Exceptions were also taken by the defendant "to the last half" of the charge given to the jury by the circuit judge, and to the verdict, "for the reason that it did not determine the quantity of land taken, as directed by the court."

It was entirely unnecessary that the jury should determine the quantity of land taken. The only controversy on that subject was, whether the strip of land taken was one hundred feet wide, as claimed by the plaintiff, or only sixty-five feet wide, as claimed by the defendant. But the proceedings before the commissioners show that a strip one hundred feet wide was condemned; and upon payment or deposit of the sum awarded by the commissioners therefor, the title thereto vested in the defendant. There was therefore no room for controversy as to the width of the strip taken; and although the judge may have directed the jury to determine the quantity of land taken by the defendant, yet it was competent for him to revoke such direction, and receive the general verdict which the jury returned to the court, and which was so received.

But I am not satisfied that the judge intended to instruct the jury to return a special verdict finding the amount of land taken and fenced in. I am inclined to think that he only intended to instruct the jury to ascertain that fact because it was a circumstance proper to be considered in assessing damages to the plaintiff. The instruction was as follows: "The jury will determine the amount of land actually taken and fenced in, and the statements made by the agent of the railroad company in the presence of the plaintiff are competent to prove what is actually taken." It is difficult to find here an instruction to return a special verdict finding "the quantity of land

Bigelow v. West Wisconsin R. Co.

taken and fenced in." But if the instruction directed a special verdict to be returned, the court revoked the instruction by implication when it received the general verdict alone, and this, for reasons already stated, was not error.

The exception to the charge of the court is too general and indefinite to be available in this court. The statement in the bill of exceptions is as follows: "To the last half of which charge the defendant then and there excepted." This court has repeatedly held that it would not review the charge of the circuit judge unless his attention was specially called to those portions complained of, when the same was given, so that he might have an opportunity to modify or withdraw the objectionable portions, should he deem them incorrect. *Nicks v. Marshall*, 24 *Wis.* 139; *Strohn v. Detroit, &c. R. R. Co.*, 23 *Wis.* 126, and cases there cited.

The court gave all the instructions asked by the counsel for the defendant. I therefore dismiss from further consideration the exceptions to the charge of the court, and to the verdict of the jury.

The trial of the action commenced October 14, 1869; and after the jury were sworn and a witness had been called for the plaintiff and sworn, the plaintiff requested the court to hold the case open a sufficient length of time to enable him to send to Monroe county for the evidence of his title to the land condemned and taken by the defendant. The counsel for defendant objected thereto, but the court granted the request, and continued the further hearing of the case to Saturday morning, October 16; to which ruling the counsel for the defendant duly excepted. The trial was not resumed until Monday, October 18; and the jury which had been impaneled and sworn on the 14th was recalled, and was the jury which heard the case and rendered the verdict therein.

I see no error in this ruling. It is clearly within

Bigelow v. West Wisconsin R. Co.

the discretion of the court, in a proper case, to hold the trial open a reasonable time to enable either party to procure testimony; and unless such discretion is abused, it is not error. There is no pretense here that the defendant was injured or its rights prejudiced in any manner by this ruling of the court; and I think that such ruling was not an abuse of the discretion which the law gave the circuit court in that behalf.

The only remaining exceptions to be considered are those which were taken to the rulings of the court admitting certain testimony offered by the plaintiff upon the trial of the action.

It appeared upon the trial that the plaintiff was the owner of the northwest quarter of a certain section, and that the railroad of the defendant was located and built diagonally across the northwest corner thereof, and entirely upon the northwest quarter of such quarter section. The testimony showing that the plaintiff was the owner of the northeast quarter, and the south half of the quarter section, was objected to.

Several witnesses were also allowed to testify, under like objection, as to how much less the remainder of the quarter section was worth at the time the land was taken by the defendant, than the whole quarter section would then have been worth had the same not been taken.

The objection to the foregoing testimony is predicated upon the peculiar language of the charter of the defendant providing for condemning land for its railroad, &c. The charter simply makes provision for an appraisement and award of *the value of the land taken*, and is entirely silent on the subject of compensating the owner for any damage which may result to him in case such taking of his land depreciates the value of his other lands lying contiguous to that so taken, and being part of the same tract (*Priv. and L. Laws of 1863*, ch. 243). It is urged that this language distin-

Bigelow v. West Wisconsin R. Co.

guishes this charter from nearly all of the railroad charters which have been granted by the legislature of this state; and that while under such other charters the owners of the land taken may recover compensation for the damages to his whole tract, by reason of the taking of a portion of it, he can only recover, in a case arising under the charter of the defendant, the mere naked value of the land actually taken, without regard to the effect of such taking upon the balance of his lot or farm.

If this position is correct, then very clearly the circuit court erred in admitting the foregoing testimony against the objection of the defendant; and as such testimony evidently increased the amount of damages assessed, it would follow that the judgment should be reversed. On the other hand, if this position is incorrect—if it was competent for the plaintiff to show how the residue of his farm was affected in value by reason of the taking of the strip in question by the defendant—then it seems equally clear that the rulings of the court below admitting such testimony were correct, and that the judgment should be affirmed.

After a careful consideration of the subject, I am impelled to the conclusion that the construction of its charter for which the counsel for the defendant has so earnestly and ably contended, is untenable. He concedes, if I understand him correctly, that had the charter provided for making *compensation* to the owner of the land taken, or for assessing his *damages*, under the authorities, the rule would have been otherwise. I think that it is not difficult to demonstrate that the terms "assessing the value of the land taken," and "making compensation to the owner for the land taken," mean the same thing.

Section 13, article 1, of the constitution of this state provides that "the property of no person shall be taken for public use without just compensation therefor."

Bigelow v. West Wisconsin R. Co.

Under this restriction the State may, in the exercise of its right of eminent domain, appropriate to public use the private property of the citizen. In respect to the land taken from the plaintiff, the state has delegated, or has attempted to delegate, to the defendant, this high attribute of its sovereignty. But the defendant takes the power subject to the restriction, or it does not take it at all. Unless the law which purports to confer the power to take the land provides for just compensation to the owner thereof, it is in violation of the constitutional restriction, and therefore void. Hence, unless the provision in the charter of the defendant for "assessing the value of the land taken" is equivalent to one giving the owner "just compensation for the land taken," the charter in that respect is void, and the company have no power to take land for any purpose, without the consent of the owner thereof. It must be assumed that the legislature intended to confer upon the defendant a valid power; and if so, the conclusion is irresistible, that by the terms "value of the land taken" it meant just compensation to the owner for the land which it empowered the defendant to take.

It requires neither argument nor reference to authorities to show that when the language of a statute admits of two constructions, one of which would render it constitutional and valid, and the other unconstitutional and void, that construction should be adopted which will save the statute. An application of this rule to its charter defeats the construction for which the counsel for the defendant contends, and saves to the defendant the powers therein granted. Inasmuch as the defendant has taken private property pursuant thereto, it cannot justly complain if we give to the charter a construction which will save the rights thus asserted under it. We hold, therefore, that the provision of the defendant's charter by virtue of which the land of the plaintiff was taken, entitles him to just compensation therefor.

Bigelow v. West Wisconsin R. Co.

The only remaining question to be considered is, What constitutes such just compensation? In *Rochester, &c. R. R. Co. v. Budlong*, 6 *How. (N. Y.) Pr.* 487, JOHNSON, J., says: "Compensation includes not only the value of the portion taken, but the diminution of the value of that from which it is severed, also." Nearly all the authorities bearing upon this subject are to the effect that "just compensation" consists in making the owner good, by an equivalent in money, for the loss he sustains in the value of his property by being deprived of a portion of it. *Rochester, &c. R. R. Co. v. Budlong*, *supra*; *Evansville, &c. R. R. Co. v. Dick*, 9 *Ind.* 433; *Harvey v. Lackawanna, &c. R. R. Co.*, 47 *Pa. St.* 428; *Schuylkill Navigation Co. v. Thorburn*, 7 *Serg. & R. (Pa.)* 411; *Same v. Farr*, 4 *Watts & S. (Pa.)* 375; *Pierce on Am. Railroad Law*, 203, title "Measure of Damages," and numerous cases cited in note 1, p. 204. I cite but a very small portion of the cases which sustain this doctrine.

To the same effect is the reasoning of this court in *Robbins v. Milwaukee, &c. R. R. Co.*, 6 *Wis.* 636, and in *Snyder v. Western Union R. R. Co.*, 25 *Id.* 60; and *Welch v. Milwaukee, &c. R. Co.*, *ante*, 1. See also *Milwaukee, &c. R. R. Co. v. Eble*, 4 *Chand. (Mich.)* 72. Some of these cases were decided upon statutes, and without direct reference to the constitutional provision under consideration. This may be true of many of them, though not of all. But the fact that statutes authorizing the taking of private property for public use so universally provide, not only for paying the owner "the value of the portion taken, but also the diminution in the value of that from which it is severed," demonstrates that such provisions are generally understood to be necessary to meet the constitutional requirement that just compensation be made therefor. However that may be, the definition above given, as deduced from the authorities, is so eminently

Rockford, &c. R. R. Co. v. Schunick.

reasonable and just, that we adopt it without hesitation, and hold that where private property is taken for public use, the "just compensation" which the constitution provides shall be made therefor, consists in paying to the owner thereof, "not only the value of the portion taken, but also the diminution of the value of that from which it is severed."

Applying these principles to this action, it was competent for the plaintiff to prove that he was the owner of the whole quarter-section, and also how much it was depreciated in value by reason of the taking of the strip of land in question by the defendant. This is precisely what he was permitted to do. We find no error in the rulings of the court in admitting testimony, of which the defendant has any right to complain.

The judgment must be affirmed.

By THE COURT.—Judgment affirmed.

THE ROCKFORD, ROCK ISLAND & ST. LOUIS
RAILROAD COMPANY v. SCHUNICK.

Supreme Court of Illinois;

Term, 1872.

Agreement to secure right of way to railway company. In a proceeding to condemn lands for the construction of a railroad, the railroad company, to defeat the right of the owner to damages, introduced in evidence a writing containing a conditional subscription to the stock of the company, and an agreement to secure to the company their right of way free of expense, signed by the owner of the land and others. The instrument contained a proviso that it should not be delivered to the railroad company until one hun-

Rockford, &c. R. R. Co. v. Schunick.

dred subscribers should be secured. *Held*, that the act of receiving one hundred subscribers was a condition precedent to the company's having any beneficial interest under the instrument; and to show performance of the condition, it was not enough that one hundred names appeared on the instrument; the genuineness of the signatures must be proved.

Estoppel. Such an instrument could not operate as an estoppel *à pais*, unless the railroad company should show that it accepted the terms of the instrument, and was so far governed and influenced by them in its action that to allow the subscribers to withdraw from or deny what was proposed or agreed by the instrument to be done, would be a fraud upon or unjust to the company.

Execution of agreement to secure right of way. An agreement to secure to a railway company, free of expense, the right of way over certain lands, to include a strip of land a specified number of feet in width, is virtually an agreement for the sale of an interest in land, within the statute of frauds; and if executed by an agent of the owner, the authority to execute it should be in writing. Or if, the owner being unlettered, such an instrument is signed with his name by another in his presence and by his direction, if such direction to execute the instrument is obtained by misrepresentations as to its contents and effect, made by such other person for the purpose of inducing the land-owner to execute the instrument, it is void.

Appeal to the supreme court of Illinois from the circuit court of Warren county.

The facts in the case are stated in the opinion.

C. M. Osborne, for appellant.

Harding, McCoy, & Pratt, for appellee.

MOALLISTER, J.—This was a proceeding instituted by appellant to condemn the lands of appellee for the uses of a railroad. The land was situated in the township of Spring Grove, Warren county, and this appeal is from the judgment of the circuit court of that county in favor of appellee for compensation and damages on

Rockford, &c. R. R. Co. v. Schunick.

account of land taken and damaged. To defeat appellee's right to compensation and damages, appellants introduced in evidence on the trial a certain instrument in writing to which appellant was only a beneficial party, if any, purporting to have been executed by fifty-seven persons, including the appellee, and embracing two distinct subjects: 1. That of conditional subscription to the stock of appellant corporation; 2. That of securing to appellant the right of way through said township. The part of the instrument relating to subscription has no relevancy whatever to this controversy. But it is claimed by appellant's counsel, that the other part of the supposed agreement cut off appellee's entire claim for either compensation or damages, and this is urged upon the ground of estoppel *in pais*.

The terms of this part of the agreement are, in substance, that in order that the right of way might be made secure to said company free of all charges and expense, and that the company might not be delayed in the construction of its line through said township, in consideration of one dollar to the undersigned paid, the receipt whereof was acknowledged, they, the undersigned, jointly and severally agreed to secure to the company, free of charge and expense to the same, the right of way on, over, and across the lands in said township, such right of way to include a strip of land one hundred feet in width, to be described as a strip of land fifty feet in width on each side of the center line of the established survey of said railroad on, over, and across the lands in said township of Spring Grove. The instrument contained the following, in the nature of a proviso: This subscription and agreement to secure right of way is not to be put in possession of said railroad company until one hundred subscribers are secured thereto.

The appellants, to show compliance with this proviso, introduced another instrument, said to be in sub-

Rockford, &c. R. R. Co. v. Schunick.

stance, at least, a copy of the first, which purported to have been subscribed by fifty-nine persons.

When these instruments were offered in evidence, they were objected to by appellee's counsel. Appellee, as appears by the record, had a clear right to compensation and damages, and the verdict in his favor is sustained by the evidence, unless he was debarred the right by the instrument alleged to have been executed by him and offered in evidence. The burden was, therefore, upon appellant to make good the grounds upon which it sought to divest him of his rights. Does this record show that appellee was debarred his right to compensation and damages? We think it entirely fails in that particular.

In the first place, the appellant failed to prove that one hundred persons had subscribed the agreement, even if both documents be regarded as one. There was no evidence of the genuineness of any one signature. The act of receiving one hundred subscribers to the instrument was a condition precedent to the railroad company having any beneficial interest under it. It was not enough that so many names appeared; it should have been shown that their signatures were genuine. This was not done. There was but one witness on this point; he testified that he copied the second instrument from the first. "I went," he says, "with Porter to get subscribers to it. The first time we met to compare we did not have one hundred subscribers; the next time we did have *what we considered* one hundred subscribers. I handed the paper to the railroad company." No witness testified to the genuineness of any of the signatures, and the expression that they had "*what they considered* one hundred subscribers" will not do. The fair meaning of the proviso is, that the undertaking or instrument was not to be delivered to the railroad company until one hundred subscribers were secured thereto. If it be considered a

Rockford, &c. R. R. Co. v. Schunick.

contract between the subscribers, based upon the consideration of mutual promises for the benefit of the railroad company, still it could not be operative to vest the company with the beneficial interest until one hundred subscribers, who would be legally bound, were secured thereto. Secondly : There was not sufficient shown to make the instrument effectual as an estoppel *in pais*. It is upon that ground only that appellant's counsel rely. But to give it that effect it was necessary for appellant to show that it accepted the terms of the instrument, and was so far governed and influenced by them in its action that it would be a fraud upon or unjust to the appellant, to allow the subscribers, and especially appellee, to withdraw from or deny what was proposed or agreed by the instrument to be done.

The case is utterly wanting in any such element. There is no evidence that the appellant corporation accepted the terms proffered, or was in any manner influenced to alter its condition or govern its action thereby. But from what appears in this case, it would be monstrous to hold that appellee was debarred of his right to compensation and damages, or either, by reason of the paper introduced in evidence. The appellant's road was so located as to run through appellee's orchard and a part of his dwelling-house ; appellee, as appears without controversy, is an unlettered man, being unable to either read or write. While at work in his field he was approached by a man of the name of Holloway with this paper. Holloway knew appellee was unlettered. He did not read the paper to him, and stated only that part which related to the subscription. He not only did not read or state that part of the instrument relating to the right of way, but assured appellee that he could obtain compensation for his land if taken. Holloway testifies that he signed appellee's name to the paper by his direction. From this fact appellant's counsel insist that Holloway was appellee's agent, and that being so,

Rockford, &c. R. R. Co. v. Schunick.

appellee could not avail himself of the misrepresentations of his own agent to avoid the instrument. On this ground the court below made an indefinite exclusion of the evidence showing the circumstances under which the paper was executed, but refused to give any instruction asked by appellant directing the jury to disregard it, and appellant now complains of such refusal. Holloway does not state when or where he signed appellee's name; but only that he did it by his direction. It must have been done then and there in the presence of the appellee, the latter merely using Holloway's hand, as it were, to write his own name; or at some other time and place, in the absence of appellee, Holloway acting in that behalf upon an alleged oral authority to make a contract for appellee. If he so acted in executing it, and the instrument itself amount to a contract with appellant, it was one virtually for the sale of an interest in land, and the authority to execute it as agent of appellee should have been in writing. If the name was signed by Holloway in appellee's presence, and at his request, then the only reason which could be urged why it was not within the statute of frauds, requiring the authority of the agent to be in writing, would be that appellee merely employed the hand of Holloway to write his name, and that in such case the doctrine of agency in its legal sense would not apply. But assuming that to be the case, would anybody be heard to contend that although Holloway was not an agent in such sense as would require his authority to be in writing, yet he must be regarded as one to the extent of precluding appellee from setting up his misrepresentations for the purpose of avoiding the instrument in the hands of appellant? We think not. Such a rule would snatch the shield of the law from the wronged, and bestow it upon the wrongdoer; would take it from the unlettered, who need it most, and give it to those against whom it ought to be used. The

Rockford, &c. R. R. Co. v. Schunick.

appellant could not seek to take the fruits of the contract without adopting the means by which it was obtained. Besides, if the execution of the instrument was obtained in the manner disclosed by the evidence, it was void *ab initio*. It is laid down in Pigot's Case, 11 Rep. 27, that if three distinct bonds are written upon one piece of parchment, and one of them only is read to the obligor, and he, being a man not lettered, seals and delivers this deed, it is good for that which was read, and *ab initio* void for the others; and it is further said, "that every deed ought to have writing, sealing, and delivery, and when anything shall pass from them who had not understanding but by hearing only, it ought to be read also; and it is true that he who is not lettered is reputed in law as he who cannot see, but hears only, and all his understanding is by hearing; and so a man who is lettered, and cannot see, is as to his purpose taken in law as a man not lettered; and, therefore, if a man is lettered and is blind, if the deed is read to him in any other manner, he shall avoid the deed, because all his understanding in such case is by his hearing."

There is nothing in the evidence upon which to predicate negligence on the part of the appellee. The mind of the signer did not accompany the signature, and the agreement, in the particular in question, at least, was void. *Leach v. Nichols*, 55 Ill. 273.

We are of opinion that the supposed agreement was not sufficient in any view to cut off appellee's right to compensation and damages, that substantial justice has been done, and that the judgment should be affirmed.

BY THE COURT.—Judgment affirmed.

Hobart v. Milwaukee City R. R. Co.

HOBART v. THE MILWAUKEE CITY RAIL-ROAD COMPANY.

27 Wisconsin, 194.

Supreme Court of Wisconsin ; June Term, 1870.

Compensation for taking public street for horse railway. The construction and operation of a horse railway in a city street, is not such an appropriation of the street to a new use, that the owners of adjoining lots and of the fee of the land taken for the street are entitled to compensation therefor, except where such an owner suffers some private and peculiar injury; as, by being deprived of the free access to his premises which he would otherwise continue to have.

Right to highway. The owner of a store who is accustomed to have wagons with horses stand crosswise upon the street in front thereof while goods are loaded and unloaded, has no such right to the use of the street as will entitle him to recover compensation for or to enjoin the construction of a street railway, authorized by the public authorities, on the ground that the construction and operation thereof will interfere with his using the street in such manner.

Appeal to the supreme court of Wisconsin from the circuit court for Milwaukee county.

This was an action by the owner of a lot in the city of Milwaukee to restrain the defendants from constructing and operating a second track for its horse railway along the street upon which his lot fronted, over the portion of such street which he claimed to own in fee as part of his lot, subject only to the right of the public to use it as a highway. The plaintiff occupied the lot and a building upon it as a wholesale store, and was accustomed to have wagons with their horses stand transversely upon the street in front while receiving and discharging goods.

The complaint alleged that defendant was threat-

Hobart v. Milwaukee City R. R. Co.

ening to tear up the pavement and lay its track upon the street without license from the plaintiff or legal authority, and that the construction and use of the railway would interfere with the use of the street as a highway, and would cause permanent injury to the premises of the plaintiff and others. Upon this complaint, properly verified, an order of injunction was obtained.

The answer set up a city ordinance authorizing the defendant company to construct and operate its road ; described the construction of the road, and denied that it would interfere with the ordinary use of the street ; and claimed that the proposed use of the street for purposes of a street railway, under public authority, was a use by the public as a highway, and not otherwise. Upon the answer, verified, and upon affidavits, defendant moved to dissolve the injunction.

At the hearing of the motion, affidavits were also read by the plaintiff ; the affidavits of both parties bearing on the extent of the obstruction to the use of the street which would be caused by the construction and use of the track proposed, and how far the loading and unloading of goods at the stores of the plaintiff and others on the street would be interfered with.

The motion to dissolve the injunction was refused ; and from this decision the defendant appealed.

Wells & Brigham, for appellants.—The mere fact that the track was intended to be used by a private corporation, authorized to take fare or tolls, did not of itself make it a private, and not a public use. "The taking a highway for a plank or turnpike road by a corporation authorized and required to maintain and keep the same in repair, and to collect tolls, is but another mode of exercising the public easement on the land." *Angell on Highways*, 86, § 91 a ; *Chagrin Falls, &c. Plank Road v. Cane*, 2 *Ohio St.* 419 ; *Commissioners v. Wilkinson*, 16 *Pick. (Mass.)*

Hobart v. Milwaukee City R. R. Co.

175 ; Murray v. Commissioners, 12 *Metc. (Mass.)* 457 ; Walker v. Caywood, 31 *N. Y.* 60 ; Commissioners v. Temple, 14 *Gray (Mass.)* 76 ; Street Railway v. Cummins ville, 14 *Ohio St.* 545.

The laying of a street rail, without ties, without change of grade, level with the surface of the street, so as not to offer any obstruction to the passage of any vehicles in any direction, is not such a use of the street as is incompatible with the ordinary use by the public ; and no argument drawn from the case of a steam railway, with its elevated track and impassable ties, its embankments, and many complete obstacles to other travel, applies here. Brown v. Duplessis, 14 *La. Ann.* 842 ; Elliott v. Railroad Co., 32 *Conn.* 579 ; Street Railway v. Cummins ville, 14 *Ohio St.* 523 ; Emott, J., in People v. Kerr, 27 *N. Y.* 204 ; *Pierce on Railways*, 179. See also, 1 *Handy*, 52 ; 2 *Stockt.* 352. Counsel distinguished the cases of Williams v. Railroad Co., 16 *N. Y.* 97, and Ford v. Railway Co., 14 *Wis.* 609, which relate to an ordinary steam railway ; and criticised the case of Craig v. Railroad Co., 39 *N. Y.* 404.

Palmer, Hooker, & Pitkin, for respondent.

It is the settled law of this state that the proprietors of lots fronting upon a public street within a recorded plat take to the center of the street and own the soil, subject only to the right of the public to use the land as an ordinary highway. Gardiner v. Tisdale, 2 *Wis.* 195 ; 4 *Id.* 332 ; 5 *Id.* 32 ; 7 *Id.* 85 ; 13 *Id.* 692 ; Ford v. Chicago, &c. R. Co., 14 *Id.* 616 ; 18 *Id.* 35 ; 20 *Id.* 419 ; 21 *Id.* 602.

It follows "that a railroad company cannot appropriate and occupy it with the track of its road without the consent of such proprietor, or without compensation made to him, and that neither the legislature nor the municipal authorities have any power to dispense

Hobart v. Milwaukee City R. R. Co.

with such compensation." Ford v. Railway Co., 14 Wis. 609; Pomeroy v. Railroad Co., 16 Id. 640; Williams v. Railroad Co., 16 N. Y. 97; Springfield v. Railroad Co., 4 Cush. (Mass.) 63; Presbyterian Soc. v. Railroad Co., 3 Hill (N. Y.) 567; Carpenter v. Railroad Co., 24 N. Y. 655.

The fact that the defendants were to operate their railway by horse power instead of steam does not distinguish this case, in principle, from those above cited. The prohibition against taking private property for public use "without just compensation therefor," applies with equal force in this as in those cases. Wager v. Railroad Co., 25 N. Y. 526; Craig v. Railroad Co., 39 Id. 404; 1 Redfield on Railways, 3 ed. 313, 314. In each case there is a new burden imposed upon the owner of the land, and a new easement acquired, which is to some extent inconsistent with the general easement previously acquired by the public. The charter and ordinance under which the company claim show that the rights which it claims are of an exclusive character. The ordinance purports to grant "the exclusive right to lay a single or double track for a railway, with all necessary and convenient tracks for turn-outs, side-tracks, and switches, . . . and to operate railway cars and carriages thereon," &c., &c. The charter (*Priv. & L. Laws of 1865*, ch. 230) provides that "in all cases where vehicles shall meet or be overtaken by the cars or carriages of such railways, either in the city or county, such vehicle shall give way to the cars or carriages of the railway, so as not unnecessarily to hinder or detain them." In Hogan v. Eighth Avenue R. R. Co., 15 N. Y. 380, it is held that the statute regulating the meeting of carriages on the highway "has no application to the meeting of railroad cars with common vehicles," and that the company has the superior right of way. "Other carriages must keep out of the way of the cars, and if they are hit

Hobart v. Milwaukee City R. R. Co.

when the latter are proceeding at a reasonable and lawful speed, and with all such care as, considering the subject, can reasonably be used, they cannot maintain an action against the company." In *Craig v. Railroad Co.*, the foregoing decision is cited, and it is held that "the privilege of laying and using the track in such a manner confers upon the company a right to the use and enjoyment of the track, which precludes other vehicles while the operations of the company in the use of the track demand their exclusion. Such a right is . . . inconsistent with the nature of the easement acquired by the public."

The principle established by the supreme court of Ohio, in *Street Railway v. Cumminsville*, 14 *Ohio St.* 523, of permitting the street to be occupied by a railway without compensation, where no special injury results to the lot owners, and of requiring compensation where such injury does result, sustains the injunction in this case.

DIXON, CH. J.—The question involved in this case is one which has undergone very thorough examination in the courts of several of the other states, and it is improbable that any new argument or consideration can now be advanced upon either side of it. We shall not attempt to advance any, nor shall we repeat what others have said, but content ourselves with a simple statement of our conclusion, with a reference to those cases by which it will be found to be fully sustained. The examination of the question has resulted in some conflict of opinion and decision in other courts. In New York it has been held, but by a court itself divided, three of the judges dissenting, that the establishing and running of a horse railroad in the public streets of a city is an imposition of an additional burden upon the land of an adjoining proprietor covered by such street, and that such proprietor, being entitled to a compen-

Hobart v. Milwaukee City R. R. Co.

sation therefor, may maintain a suit to enjoin until compensation has been made. *Craig v. Rochester City, &c. R. R. Co.*, 39 *N. Y.* 404. But in the case of *People v. Kerr*, 27 *N. Y.* 204, Emott, J., was of the contrary opinion, holding that the building and operating of such road created no additional burden, so that the weight of opinion, so far as any has yet been expressed by the judges of the court of appeals, may be said to be very nearly evenly balanced. Opposed to the above mentioned decision are the decisions in Ohio, Louisiana, and Connecticut, where the question has been directly adjudicated, and in Massachusetts and some other states, where the contrary principle has been most clearly assumed. *Street Railway v. Cumminsville*, 14 *Ohio St.* 523; *Brown v. Duplessis*, 14 *La. Ann.* 842; *Elliott v. Fair Haven, &c. R. R. Co.*, 32 *Conn.* 579; *Sargent v. Ohio, &c. R. R. Co.*, 1 *Handy, (Ohio)* 52; *Commonwealth v. Temple*, 14 *Gray (Mass.)* 75; *Chase v. Sutton Manuf. Co.*, 4 *Cush. (Mass.)* 152; *New Albany, &c. R. R. Co. v. O'Dailey*, 12 *Ind.* 551.

The court of Ohio holds to what may be regarded as a middle doctrine between that of the majority decision in New York and the decisions in Louisiana and Connecticut, that authority to lay down the necessary structure for a street railway in a common highway or street, and to run cars thereon for the carriage of passengers for hire, may be lawfully granted to a company incorporated for that purpose, without any compensation to the owners of adjoining lots, except where some private right of such owners is thereby impaired. That court holds the doctrine that there exists in the owners of adjoining lots a private right to have free access to their lands and buildings from the street, as the same was and would have continued to be according to the mode of its original use and appropriation by the public, and that there can be no change of such mode and

Hobart v. Milwaukee City R. R. Co.

adaptation of the street to new vehicles and methods of carriage and transportation which shall materially impair or destroy such right, unless by the consent of the owners, or upon the payment of due compensation to them. The same view was suggested by two of the judges in *People v. Kerr*, 27 *N. Y.* 215. This doctrine has been somewhat freely criticised by some whose opinions are entitled to very great respect, but notwithstanding we are inclined to adopt it as being the most just and reasonable solution of the question which has fallen under our observation. It is a doctrine which imposes no unreasonable restriction upon the rights of the public in the use of its streets and highways, and which at the same time affords that protection to private or individual right which the spirit and principles of our constitution and form of government require. It is possible, as has been suggested, that it may sometimes prove embarrassing in practice to determine when and to what extent the private rights of adjoining owners have been infringed, but such embarrassments are inseparable from the consideration and determination of all similar questions. The difficulties in the way of ascertaining and determining them by no means disprove their existence or show that they ought not to be recognized and enforced.

For the reasons, therefore, which are so well stated by the court of Ohio, and in the other decisions and opinions to which reference has been made, we hold that the laying down of the rails and running of the cars in the manner shown by this case, is not the appropriation of the street to a new use, requiring compensation to be made therefor to the plaintiff, unless he has shown that he will suffer some private and peculiar injury by being deprived of that free access to his premises which otherwise he would continue to have and enjoy. This also is claimed. The building upon

Hobart v. Milwaukee City R. R. Co.

the premises is a store, used and occupied by the plaintiff as a wholesale merchant, and into and from which many heavy articles have to be constantly received and taken by wagons and drays, which are loaded and unloaded in front of the store and upon the street in question. The custom, as described by counsel, though not fully shown by the affidavits, is to back the wagons or drays up to the curb-stone or sidewalk, and to discharge or receive freight to and from the store across the sidewalk. The laying of the rails and running of the cars on that side of the middle of the street where the store is, though near the middle, will interfere with and prevent this custom. Sufficient space will not be left between the curb-stone or sidewalk and the railway track, for the teams with wagons or drays to stand at a right angle with or crosswise of the street. The heads of the horses will come in contact with the passing cars. Such is the obstruction of which the plaintiff complains, or the private and peculiar injury for which he seeks redress. Has he any such private right or easement in the street in front of his store? It is clearly our opinion that he has not. The public authorities may permit such use of the street so long as they please, or until public convenience demands it should cease; but the plaintiff cannot insist upon it as a right in himself. When the space thus occupied by his teams is required for public travel, or the passage of vehicles of any kind authorized by the public, his occupation becomes an obstruction and a nuisance, and he must turn his teams the other way, or lengthwise of the street, which may be done and yet the loading and unloading take place without any very great additional trouble or inconvenience to him. At all events he has no right to insist upon such use and occupancy of the street when the public authorities have signified their unwillingness, as they have done by authorizing the laying down of the railway track in question.

Hougan v. Milwaukee, &c. R. Co.

BY THE COURT.—The order appealed from is reversed, and the cause remanded for further proceedings according to law.

HOUGAN v. MILWAUKEE & ST. PAUL RAIL-
WAY COMPANY.

Supreme Court of Iowa; June Term, 1872.

Right of company, owning right of way, to dig wells. A deed conveying to a railway company the right of way over and through certain lands "for all purposes connected with the construction, use, and occupation" of their railway, gives the company the right to sink a well upon such land, and to use, for railway purposes, the water supplied to such well by percolation, although the supply of water to a spring upon adjoining land of the grantor may be materially diminished thereby.

Appeal to the supreme court of Iowa from the district court for Winneshiek county.

This was an action to enjoin the defendant, a railway company, from further diminishing the supply of water to a spring upon land of the plaintiff. The diminution was alleged to have been effected by defendant's digging a well upon the land which had been conveyed to it by the plaintiff for the purposes of a railway, and pumping water from such well for the use of engines upon the railway. The facts are fully stated in the opinion.

Upon trial before the district court without a jury, judgment was rendered for defendant; from which judgment plaintiff appealed.

Willett & Bennett, for appellant.

Noble, Hatch & Frase, and *T. Updegraff*, for appellee.

Hougan v. Milwaukee, &c. R. Co.

COLE, J.—The testimony tended to establish that the plaintiff is the owner of eighty acres of land through which the line of railway now owned and operated by the defendant runs; that the defendant acquired its title to the railway, its property, franchise, &c., by conveyance from the McGregor Western Railway Company, which latter company acquired the right of way, &c., through the plaintiff's land, by deed from the plaintiff which conveyed "for all purposes connected with the construction, use, and occupation of said railway, the right of way over and through" the land in controversy; upon the land were two springs, from one of which the defendant had acquired the right, by conveyances from plaintiff through others, down to defendant, to lay pipes and take water for the use of engines, &c.; this the defendant had unsuccessfully endeavored to do, and in the effort to make available the labor and expense incurred to do that, the defendant dug the well in controversy, on its right of way, near the reservoir and stationary engine constructed for the purpose of taking the water from said first spring; the effect of digging this well was to materially diminish, and at times nearly exhaust the supply of water in the other spring of plaintiff's, situated about one hundred and sixty feet from the well; the water comes into the well in three small streams on one side of it; the defendant dug the well in good faith, and without any intention or belief that it would interfere with the plaintiff's spring; the water is necessary for and is applied to purposes connected with the use of the defendant's railroad.

The court must have found from the evidence, as a matter of fact, that the well was supplied with water finding its way thereto by percolation and not by a subterranean stream. No other finding would have any support in the evidence. This being so, and in the absence of malice or wantonness, the rule is well settled

Hougan v. Milwaukee, &c. R. Co.

that the owner in fee may, in the reasonable use of his land, obstruct or divert the flow of such water, even to the injury of his neighbor's land, without being liable in damages therefor—*damnum absque injuria*; a rightful use of his own property, which he may enjoy, although thereby he may prevent his neighbor from having as full a benefit as otherwise might flow to him. *Angell on Watercourses*, and authorities cited in the notes; 2 *Am. Law Reg. N. S.* 65, and cases referred to; *Swett v. Cutts*, 11 *Am. Law Reg. N. S.* 11, January 1872, *A. M. Hawk's Case*, and note thereto by Judge REDFIELD. There seems to be now no controversy as to the correctness of the rule as above stated.

But the defendant in this case is not the absolute and unqualified owner, or owner in fee of the land whereon the well was dug. The defendant, however, is owner, by grant from plaintiff, of "the right of way over and through the land *for all purposes connected with the construction, use, and occupation* of its railway." We have not been referred to, nor have we been able to find any case deciding this question. Upon principle it is very close; and yet we find ourselves agreed in holding with the learned judge who decided the cause below, that under the terms of the conveyance and the facts of the case, the defendant had the legal right to dig the well, and cannot be enjoined from using the water therefrom for railway purposes.

It must be remembered that if the defendant can be enjoined from digging this well and using water therefrom, it can be enjoined from digging any well on its right of way. For, as we have seen by the rule above stated, if the right to dig the well exists, no damages can be recovered because of the diversion of the water from another. In other words, the fact of diverting or obstructing percolating water constitutes no basis of right in or ground for an action by another. The cause of action arises from the wrongful act of digging

Austin v. Rutland R. R. Co.

the well, and not from the consequences which flow from it. For, if the right to dig the well exists, these latter are *damnum absque injuria*. Now, that the digging of wells to supply water to its engines, is one of the "purposes connected with the use of a railway," can scarcely admit of a doubt. The right to locate a water tank upon its right of way, cannot be more clear than the right to dig a well to supply it; both are equally necessary to operate the road, and are fairly embraced in the phrase, "all purposes connected with the construction, use, and occupation of the railway."

But, it may be suggested, that, if the defendant may dig for and obtain water on its right of way to use in operating its road, then it may dig for and obtain coal on its right of way, to use also for the same purpose. We would not now affirm this, and yet the distinction is by no means broad. There is this difference, however—the use of water does not consume it; the use of coal does. Nature promptly fills the vacuum caused by using the former, but of the latter, never. The one may be kept for future use where nature deposited it or the ages made it; while the other is only for present use and cannot be held for posterity.

By THE COURT.—Judgment affirmed.

AUSTIN v. THE RUTLAND RAILROAD
COMPANY.

Supreme Court of Vermont, 1873.

Ejectment. Right of tenant for life of lands to construct railway thereon. Where a railway company, having acquired the title in fee to one undivided moiety of certain lands, and a life estate in the other moiety, constructs and operates its road over the land, an

Austin v. Rutland R. R. Co.

action of ejectment, brought by the remainder-men upon the expiration of the life estate, will not lie. The act of the railway company in locating and maintaining its road over the land while it has the exclusive right of possession is a lawful use of its own property; and the subsequent'y accruing right of the remainder-men to the joint possession does not convert such lawful use into a wrong, or make the exclusion of the plaintiffs from co-occupancy such an unlawful ouster as will support an action of ejectment between tenants in common. *So held*, where a special remedy in such cases was provided by statute.

Appeal to the supreme court of Vermont.

This was an action of ejectment to recover possession of one undivided moiety of certain lands, claimed by the plaintiffs as remainder-men, succeeding to such interest in the lands upon the expiration of the life estate previously held by the defendant, which was also owner in fee of the other moiety, and while thus in the exclusive possession of the land, had constructed a railway thereon, which it still maintained, thereby excluding the plaintiffs from possession. The facts are fully stated in the opinion. Judgment was rendered for the plaintiffs; and the defendants appealed.

W. G. Shaw and *E. J. Phelps*, for plaintiffs.

McAuley v. Western Vermont R. R. Co., 33 *Vt.* 311; *Knapp v. McAuley*, 39 *Id.* 275; *Blundell v. Catterall*, 7 *E. C. L.* 152; *East Haven v. Hemingway*, 7 *Conn.* 186; 9 *Id.* 37; 20 *Id.* 117; 32 *Id.* 501; 1 *Black*, 23; 7 *Wall.* 289; 10 *Id.* 504; 29 *Ind.* 364; 5 *Sandf.* 48; 15 *Conn.* 136; 1 *Wash. Real Prop.* 437.

Daniel Roberts, for defendants.

28 *Vt.* 257; *Doug.* 441; 19 *N. Y.* 523; 6 *Id.* 522; 8 *Cow.* 146; *Law Rep., March*, 1871, p. 165; 15 *Gray*, 1; 25 *Conn.* 352.

Austin v. Rutland R. R. Co.

BARRETT, J.—The plaintiffs have brought ejectment for the recovery of possession of the premises in question, upon their title to an estate in remainder under the will of their grandfather, who died in 1810. By his will he gave a life estate in water-lot No. 10, in Burlington, to his two daughters, Avis and Nelly, in equal undivided moieties, remainder to the heirs of each in the same moieties in fee. The plaintiffs are the children of Nelly, she having died in January, 1870. Many years ago the title and right of Avis and her children became vested in the defendants, as also did the life estate of said Nelly; and they held the exclusive possession of the property under such acquired title and right. On the decease of said Nelly Austin, her children, the plaintiffs, succeeded in remainder to their rights as owners in common with the defendants of an undivided moiety of said lot No. 10. Prior to this event, and while the defendants were holding the exclusive possession of said lot, their railroad was duly located upon it, and the whole of it was thus appropriated, and has ever since been held and used, and still continues to be held and used, for the ordinary, necessary, and legitimate purposes of the railroad. The plaintiffs have thereby been excluded from the possession, occupancy, and use thereof. There has been no appraisal or payment of land-damages, as provided by the statute laws of this state, nor in any other way. The plaintiffs, after due demand of possession, and refusal by the defendants, brought this action.

The question is, are they entitled to maintain it? It is conceded that the defendants were rightfully in the exclusive possession till the termination of the life estate of said Nelly, as aforesaid, in 1870, and that, during such possession, "they might do what they pleased with the land, provided they committed no waste." Being in possession with such title and right, it was legitimate for them to locate and make the rail-

Austin v. Rutland R. R. Co.

road as was done, and to continue it, without payment of damages to anybody, up to the time that plaintiffs could assert a right in themselves, as against the defendants. It was incident to the tenure of the defendants, as well as to the title and estate of the plaintiffs, that the railroad might be located, made, and used, without payment of damages to the plaintiffs, during the period of the defendant's right to exclusive possession in virtue of such tenure. There was no life-tenant to be regarded. There was no remainder-man to be regarded, till such remainder-man's right to claim possession was available to him. We think, then, that all the reasons for what was held in the cases of *McAuley v. Western Vermont R. R. Co.*, 33 and 39 *Vt.*, and in *Troy, &c. R. R. Co. v. Potter*, 42 *Id.* 272, apply with unabated force in the present case.

Saying nothing as to the matter of knowledge and implied assent on the part of some of the plaintiffs, upon which a point was made in the argument, it would seem that when the defendants, in the exercise of their lawful right as against these plaintiffs, have located and made their road on the lot in question, they should no more be subjected to being ousted, or to having the plaintiffs let into co-possession, than in case the plaintiffs had been absolute owners of the whole lot throughout, and had assented to the doing of the same, without having the damages first appraised and paid.

In the cases referred to above, the point of the reason against permitting the landowner to eject the corporation, or to be let into possession, joint or otherwise, is, that the corporation had done a lawful act in locating and making the road through the land in question, without first having the damages appraised and paid. In those cases the lawfulness of the act resulted from the consent of the landowner. In the case before us, the act was equally lawful, it having been done by the party lawfully in exclusive posses-

Austin v. Rutland R. R. Co.

sion, and who might lawfully do it in virtue of its title and estate in the premises. This being so, we think it would contravene both the reasons and the rules that have had operation and force on this subject, now to hold that the lately accrued right to the plaintiffs, of availing themselves of their estate in the premises, changes what the defendants have done in locating, making, and maintaining their railroad into a wrong as against these plaintiffs, and the exclusion of them from a co-occupancy, into such an unlawful ouster as will entitle them to maintain this action.

On the other hand, the provisions of our statutes seem plainly to indicate the legislative sense of the state to be in harmony with the judicial sense, as manifested in the decided cases involving the subject.

Gen. Stat. ch. 28, § 17, which makes provision for the appraisal of land damages in case the parties do not agree about them, contemplates that, in some cases, land may be taken and damage thereby sustained before appraisal shall have been made, and it contains provisions for the appraisal and payment of damages in such cases, as well as in others. In this connection it should be remarked, that the provisions of the statute for the appraisal of damages before the said road can lawfully be made, do not seem to contemplate or to be adapted to a case like the present. It does not fall within the terms or the meaning of section 20 of that chapter, which is applicable only to cases in which damage to right of dower, or estate for life or years, is to be appraised, in which cases the damage to the reversionary interest may also be appraised.

Here was no estate for life to be damaged, for it was in the defendants; and so it was not a case for appraising damages to the interest in remainder. Indeed, the inapplicability to this case of the other incidental details, in the provisions for the appraisal of land damages before the making of the road, enforce the

Austin v. Rutland R. R. Co.

idea that cases like the present were not intended to be subject to those provisions.

When we turn to section 26 of the same chapter, it is seen to be full and explicit in provisions for such cases, thus: "In every case where a railroad company have entered upon, taken possession of, and used land and real estate for the construction and accommodation of their railroad . . . and shall not have paid the owner therefor, nor, within two years from such entry, had the damages appraised, &c., the ordinary courts of law shall have jurisdiction thereof, to wit: justices of the peace, &c., and the county court, &c., and any person claiming damages may bring suit therefor, in the usual form, &c., and shall recover only actual damages."

This seems to contemplate that the company might have two years after such entry, taking possession, and using, in which to get such damages appraised pursuant to the provisions of section 17. It seems difficult to suppose that it was contemplated at the same time, that in the mean time they should be liable to be ousted by action of ejectment. We think that the alternative remedy provided in section 26 clearly indicates that, after the lapse of said two years, without such appraisal having been made, not by ousting the company by action of ejectment, but by suit for damages, the landowner is to get what he would have realized as the fruit of the proceeding provided in section 17.

These provisions of the statute seem to recognize the peculiar character of the subject matter, much as the courts have recognized and regarded it, in our own and in other states. A most marked instance of such recognition is the case of *Sturgis v. Miller*, 31 Vt. 1. The same is true of the other cases above referred to.

We concur, then, in holding that, in the case as it is now before us, the plaintiffs are not entitled to have a judgment, giving them co-possession with the defend-

Austin v. Rutland R. R. Co.

ants of the land in question. In the views thus presented, we design to propound only the law of the present case, leaving cases made up of other elements, and characterized by different features, to abide such consideration as may seem meet when they shall be before the court for adjudication.

In holding as we do in this case, we are not unmindful that a party, in ordinary cases, unaffected by peculiar statutory provisions, would be entitled to maintain ejectment against his co-tenant, when wrongfully excluded from the possession of the common property by such co-tenant.

We put this decision on the ground, as above indicated, that the subject matter (when regarded with reference to the law ordinarily governing the action of ejectment in its origin and development) is extraordinary and peculiar—that the property was lawfully put to its present use by the defendants, as against these plaintiffs—that special statutory provision is made for ample remedy in such a case, and having reference to the public interests involved in and affected by the construction and operation of railroads; and, in view of what has been held in other cases standing upon the same reasons, it is fairly to be assumed that such statutory provision for remedy was intended to supersede the common remedy by action of ejectment, which is available in ordinary cases between tenants in common.

We have not deemed it advisable to enter upon a discussion of the question, whether the plaintiffs would have a lien for the damages recovered by them under said section 26, as our attention was not called to it in the argument, except by a passage in the brief for defendants—that “plaintiffs’ right to full damages is reserved to them by a specific *lien* on the lands,” citing said sections 17 and 26, *Gen. Stat.* ch. 28. Of course, aside from such resource, they would have all the

Austin v. Rutland R. R. Co.

rights of any judgment creditor for enforcing judgment against a judgment debtor.

The case presents another and distinct feature, viz.: within the period of the defendants' exclusive possession of said lot, the defendants, in the construction of said railroad, and for the laying of necessary tracks, had filled in with earth a distance of 110 feet into the lake, beyond the original water boundary of said lot, and had built a dock extending still further into the lake.

It is claimed for the plaintiffs, that said made land and dock are embraced within the estate which they own under said will of their grandfather. The township of Burlington, in the original location and survey, was bounded west "on the shore of Lake Champlain." The lot, in its original location and survey, and as it was described in the proprietor's records, contained twenty rods of land, bounded on the north by the south line of South street, east by the west line of Water street; being fifty links in width on said Water street, and bounded "west by the waters of Lake Champlain." In the year 1800 that lot, thus bounded, became the property of said testator. It remained unchanged in that respect, and in the condition of its water-front, during the life of the testator, and up to the time when the defendants made said additions of land into the water of the lake. Neither the testator, nor any one under him, made any erections or structures on the water-front, in the character of pier, dock, wharf, or storehouse. So nothing had been done in the nature of asserting or exercising any right in those respects, as appertaining to that lot, in reference to the lake for any purpose. The testator enclosed and occupied during his life only the east half of said lot; defendants' counsel understand that lot No. 10 extended to low-water mark, and that the estate of the plaintiffs extends to the same line. The right of the plaintiffs is

Austin v. Rutland R. R. Co.

thus conceded to the utmost limit of title and ownership in the soil known to the law, as shown by the text-books and decided cases, whether in the nature of a corporeal or incorporeal hereditament. All that can be claimed for the plaintiffs, as the ground of their alleged title and interest in the made land, is the right that the owner of said lot, as it originally was, had to pass to and from the waters of the lake within the width of the lot, as it bordered on and was washed by said waters. It is not denied that the lake is "navigable water," in the sense of the law governing public and private rights in respect thereto. There is no occasion, therefore, to discuss or decide whether the common law of England, or of Massachusetts, or of Connecticut, or of any other state, is the common law of Vermont as to such rights. We remark, however, that there is no *common law* of Vermont, by which the owner of land bounded on Lake Champlain has a right, beyond low-water mark, to appropriate as his own the bed of the lake. Neither the legislature nor the courts have recognized any such right except as it has been conferred by act of legislation. And the whole course of legislation on the subject indicates that there was no such right by any kind of common law in this State. See act of 1802, granting to the Burlington Bay Wharf Co. the privilege of erecting and continuing a wharf. Also the act of 1825, giving the right to Messrs. Keyes to extend a wharf into the lake from low-water mark. Also acts No. 41 and No. 42, in 1826, of a similar character.

The matter had thus proceeded up to 1839, when, in the revised statutes of that year, section 7, chapter 59, it was enacted, that "All persons who may have erected any wharves, &c., *agreeably to the provisions of any grant heretofore made*, or agreeably to the provisions of this chapter, their heirs and assigns, shall have the exclusive right to the use, benefit, and control of such wharves, &c., for ever." This seems plainly to show

Austin v. Rutland R. R. Co.

the idea of the legislature to have been, that the right to build a wharf or other structure beyond the land of the riparian owner, into the water of the lake, depended on a legislative grant, either shown or presumed. And the same is clearly shown by the preceding section 5, viz: "Any persons owning lands, adjoining Lake Champlain, may erect any wharf or store-house, and extend the same *from the land of such person* in a direct course into Lake Champlain . . . between the lands of such person and the channel of the lake." This contemplates that the right to build into the lake "from the land," &c., is given by that provision of the statute.

There is no ground for claiming that those general legislative enactments were only in affirmance of already existing common law of the state; for not only does the fact of such legislation, and the terms and provisions of it, discountenance such claim, but the special legislation that had preceded it, and which is emphatically recognized in said section 7, *Rev. Stat.* ch. 59, is altogether inconsistent with it. The right, then, that existed in the testator, as owner of lot No. 10, was not a right appurtenant to the lot to build into the lake in front of it. He had only, and at most, so far as the lake was concerned, a right, in common with all other persons, to use the waters of the lake in any proper way, and for any proper purpose. As the absolute owner of said lot, he had the exclusive right to use it in passing to and from the lake. But this gave him no peculiar or additional right as to the lake itself. Of course it could not give him title to erections or structures made by others beyond the limits of his own land. If, in making such erections and structures, others should violate any right of his, as owner of the land to low-water mark, he could seek redress in some proper way, but not by action based on his right as the owner of them. If they should be a nuisance, in the

 Austin v. Rutland R. R. Co.

legal sense, the abatement of them might be invoked by a proceeding proper for that purpose. The doctrines of the law as applicable to this feature of the case are well developed and applied in *Gould v. Hudson River R. R. Co.*, 6 *N. Y. (2 Seld.)* 522, and in *Harvard College v. Stearns*, 15 *Gray (Mass.)* 1; also in *Paterson, &c. R. R. Co. v. Stevens*, 10 *Am. Law Reg. N. S.* 165.

In those cases the learning of the subject is so amply embodied, analyzed, and applied, that little would be gained by repeating what has been done by the learned courts in the decisions referred to. The case of *Nichols v. Lewis*, 15 *Conn.* 136, is not at odds with the views which we hold in the case in hand. In that case it was held that the plaintiff owned a tangible property between high and low water-mark where the tide ebbed and flowed, of which he was entitled to the possession as against the defendant, by whom he had been ousted, and that he could recover by ejectment the possession of the *locum in quo*, notwithstanding the defendant had made on it a dump or fill of earth—so far as the dump was concerned, it being put on the same ground, “as if a man builds on another’s land, the building belongs to the owner of the land.”

The kind of estate which, in Connecticut, a riparian owner on navigable water, like the plaintiff in that case, has in the shore, is indicated by *Hosmer*, Ch. J., 7 *Conn.*, 202, in commenting on a passage in *Swift’s System*. He says: “By this expression I do not understand that the proprietors alluded to were *seized*, but they had a right of occupation, properly termed a franchise.” Those cases were very different from this. Here was no building upon the plaintiff’s land—only an abutting against it by a structure made outside of it. It is not a case of accretion or gradual reliction, which belongs to the riparian owner. It does not fall within the right *usque ad cælum*, for that of itself does not

Austin v. Rutland R. R. Co.

often extend more widely than the *solum* of the owner, on which such rights must be grounded. Most of the other cases cited by plaintiff's counsel arose with reference to the right to appropriate and use the *shore*—the space between high and low-water mark—where the tide ebbs and flows. As to rights beyond low-water mark, they countenance and maintain our views in this case. In *Blundell v. Catterall*, 7 E. C. L. 152, it is shown that the exclusive right in the plaintiff to the shore of the navigable water in question did not exist, except by grant from the crown. In that case the learning on the subject of riparian rights along navigable waters is exhaustively developed by discussion and citation, and entirely in consonance with the present decision.

We have examined the cases cited in the U. S. Supreme Court Reports, and find that none of them maintain a right of soil in the plaintiffs beyond low-water mark. And that must be maintained, in order to entitle them to recover in ejectment the made land in question. The case of *Dutton v. Strong*, 1 Black, 23, most confidently urged upon our attention by counsel for plaintiffs, countenances precisely what we hold as to rights beyond low-water mark. We cite some passages of the opinion by CLIFFORD, J., p. 31: "Bridge-piers and landing-places, &c., are frequently constructed by the riparian proprietor on the shores of navigable rivers, bays, &c., as well as on the lakes; and, where they conform to the regulations of the state, and do not extend below low-water mark, it has never been held that they were a nuisance, unless it appeared that they were an obstruction to the paramount right of navigation." "Our ancestors, when they immigrated here, undoubtedly brought the common law with them; . . . but they soon found it indispensable, in order to secure these conveniences, to sanction the appropriation of the soil between high and

Austin v. Rutland R. R. Co.

low-water mark to the accomplishment of these objects. Different states adopted different regulations upon the subject, and, in some, the right of the riparian proprietor rests upon immemorial local usage. Wherever the water of the shore (of the lake) is too shoal to be navigable, there is the same necessity for such erections as in bays and arms of the sea; and, where that necessity exists, it is difficult to see any reason for denying to the adjacent owner the right to supply it; but the right must be understood as terminating at the point of navigability, where the necessity for such erections ordinarily ceases." The question in that case was, whether the defendants, who had built such a pier on the shore of Lake Michigan, had such a property right in it as to entitle them to prevent the plaintiffs from causing its destruction by hitching their vessel to it in stress of weather,—a very different question from that of right of soil in land made by another outside of the testator's water front of low-water mark into the body of the lake. The other cases cited need no comment, for it is not claimed that they are more in point than those noticed above.

According to these views the judgment is reversed, and cause remanded.

BY THE COURT.—Judgment reversed.

Indianapolis, &c. R. Co. v. Hartley.

THE INDIANAPOLIS, BLOOMINGTON, & W.
RAILWAY COMPANY v. HARTLEY.

Supreme Court of Illinois, 1873.

Eminent domain. Taking highway for railway purposes. Where the fee of a street within the limits of an incorporated city is in the proprietors of the adjoining lands, neither the State nor the municipal authorities can grant to a railway company the right to construct its track across the street, without obtaining the consent or making compensation to such adjoining owners.

Where the fee in a highway remains in the owners of the adjoining lands, it is immaterial whether the easement of the public was acquired by condemnation or dedication; a different use of the land from that for which it was dedicated, or in view of which damages were assessed to the owner, cannot be justified on the ground that a railway is an improved highway.

Appeal to the supreme court of Illinois from the circuit court for McLean county.

This was an action for trespass to the lands of the plaintiffs by the defendant in constructing its railway across a street upon which plaintiffs' land abutted, and the fee of which plaintiffs claimed. The facts of the case are fully stated in the opinion. The jury rendered a verdict for the plaintiffs; and from the judgment entered thereon the defendants appealed.

Weldon & Benjamin, and Charles Black, for appellants.

M. W. Packard, and Hamilton Spencer, for appellees.

Indianapolis, &c. R. Co. v. Hartley.

SCOTT, J.—The land upon which the alleged trespasses were committed was never platted and laid off as a part of or of any addition to the city of Bloomington, but is within its corporate limits, and was so situated at the committing of the grievances complained of in the declaration.

Prior to the extension of the city limits a public highway known as the "Peoria Road" had been established on the south side of the premises in controversy, of the width of sixty feet, one-half being on the land now owned by appellees. After the limits of the city had been extended so as to include this tract of land, which was done some fifteen or twenty years ago, the highway over which the public had exercised jurisdiction for so many years at that point was called Front street, being a continuation by common consent of a street of that name to the western boundary of the city, and by dedication or common use it was made fourteen feet wider than the old road; but whether any portion of the fourteen feet came off the premises owned by the appellees does not very clearly appear, nor is it very material. The city neither purchased nor condemned the additional number of feet added to the street. There was no ordinance formally extending Front street westward, but the city assumed and continued to exercise jurisdiction over the highway as a street the same as other streets in the city.

Under the authority given by the city by ordinance to lay the track upon and across any street or alley within certain limits, the appellants constructed its road across Front street, south of appellees' premises, without their consent.

In constructing the road-bed the appellant caused the street to be excavated to the depth of four or five feet. The track nowhere touches the land in the enclosure of the appellees, but comes within six inches or a foot of it at one corner, and if they own to the

Indianapolis, &c. R. Co. v. Hartley.

center of the old highway, then it is constructed on land the fee of which is in them.

The excavation in the street made it necessary to lower the grade in front of the premises of the appellees, and in doing so the company removed a large amount of earth. This latter work appears to have been done by the company, under the direction of the street commissioner, so as to have an even grade on which the public travel could more conveniently pass over the track.

The premises of the appellees had previously been above the grade of what is called Front street, but the construction of the company's road across the street, and the grading that was necessary to be done to get an even grade, left them still very much higher, and rendered ingress and egress more difficult for carriages and even for persons on foot.

It cannot be successfully contested that the appellees owned the fee of the land to the center of the old highway.

It was never conveyed to the city by any formal grant, by plat or otherwise. The adjoining proprietors never parted with the fee. Had they platted the ground into lots and streets under the statute, the plat itself when recorded would have operated as a grant of the fee to the corporation. This they did not do. The city could and did acquire an interest in the street, although the grounds were never set apart for that specific purpose in the manner prescribed in the statute. It may be by dedication or common use, and in such cases the fee would remain in the original proprietors, burdened with a public easement. *Canal Trustees v. Havens*, 11 Ill. 554; *Hunter v. Middleton*, 13 Id. 54; *Manley v. Gibson*, 13 Id. 398.

It is not questioned the city had granted the appellant the necessary authority to construct its road across the street, and the principal question in the case

Indianapolis, &c. B. Co. v. Hartley.

is, whether the state and the municipal authorities combined have the power to grant the company the right to construct its track across lands the fee of which is in the appellees, without obtaining their consent or making compensation.

On the one hand it is insisted that the appellees' proprietary rights have been interfered with, and that the action of the company in taking possession of the land comes within the constitutional inhibition that private property shall not be taken for public use without just compensation. On the contrary, it is claimed that it is immaterial whether the city owns the fee of the street or not, the municipal authorities have the supreme control over all streets, and can grant the right to lay a track on or across any street, and having done so in this instance, if ingress and egress is not materially affected, it is *damnum absque injuria*.

The exact question presented has not been passed upon by this court. The authorities bearing upon it are by no means harmonious.

There is a class of cases that hold it is immaterial whether the municipality owns the fee in the street or not; it may, if the legislature has conferred power for that purpose, grant a railroad company the right to construct and operate its road along or across any public street. In another class of cases the power has been confined to municipalities owning the fee of the streets.

Both classes of cases, however, rest upon the same principle, viz: a railroad is only an improved highway, and the public, having the right to the exclusive use by legislative authority, may grant the use of streets for this mode of travel, although no such use was contemplated when the streets were dedicated to public use.

The decisions in this state, prior to the adoption of our present constitution, are in reference to cases where the city granting the privilege owned the fee in the streets.

Indianapolis, &c. R. Co. v. Hartley.

The trespasses complained of in the case at bar were committed prior to the adoption of our present constitution, and the right to recover is not affected by its provisions.

In *Moses v. Pittsburg, &c. R. Co.*, 21 *Ill.* 516, it was held where the corporation owns the fee of the streets, and by its charter the local authorities are invested with exclusive control over them, and those authorities grant permission to locate railway tracks along a street, the owners of property fronting thereon cannot enjoin the laying of such tracks, nor recover any damage or compensation for the use of the streets so occupied.

In *Murphy v. City of Chicago*, 29 *Ill.* 279, it was held to be a legitimate use of the street or highway to allow a railroad track to be laid down in it, and for so doing the city is not liable to any damages that may accrue to individuals. What is said in these cases is in reference to streets where the fee is in the corporation granting the privilege. No question of an ordinary highway is involved in either of them. We are not disposed to extend the principles or the reasoning of these cases any farther, or apply them to cases not strictly within their meaning.

A distinction has been taken where the municipality granting the right to lay the track owns the fee in the street and where the fee remains in the abutting land owner, and it seems to us that it rests on sound principles, and is supported by the highest authorities.

Where the fee remains in the original proprietor it is immaterial how the public acquired an easement over the lands, whether by condemnation or by dedication, it is only for the use of ordinary travel, such as we are accustomed to see on streets or highways. In case the proprietor dedicated the land it was for no other purpose, and if it was condemned his damages were assessed with no other view.

Indianapolis, &c. R. Co. v. Hartley;

A different use of the land from that for which it was intended cannot be justified on the ground that a railway is an improved highway. Railway companies are only public corporations in a limited sense.

The right of way, the road bed, and the carriages propelled thereon, are owned by private individuals and not by the public.

Fares are charged for travel thereon for the exclusive benefit of the parties owning the road. They are constructed and equipped in the interest of private speculation, but at the same time they are intended to subserve the public good.

The travel on them bears no analogy to our notions of travel on an ordinary street or highway, where every one travels at pleasure in his own conveyance without paying tolls or fares. The uses are totally different and even inconsistent. The one is exclusive, in favor of private interest, and the other is open and free to all.

The doctrine most in consonance with our sense of justice is, where the fee of the street remains in the abutting land owner, the corporation may grant the right to a railway company to lay its track along or across any street, but the company avails of its privilege at its peril. If in laying its track it causes a private injury to him who owns the fee in the adjoining premises it must make good the damages sustained.

The following cases are in harmony with our views of the law, and are conclusive of the case at bar: *Presbyterian Soc. v. Auburn, &c. R. R. Co.*, 3 *Hill*, 567; *Williams v. New York Central R. R. Co.*, 16 *N. Y.* 97; *Maham v. New York Central R. R. Co.*, 24 *Id.* 658; *Springfield v. Connecticut R. R. Co.*, 4 *Cush. (Mass.)* 63; *Haynes v. Thomas*, 7 *Port. (Ind.)* 39; *Tate v. Ohio, &c. R. R. Co.*, *Id.* 480; *Nicholson v. New York, &c. R. R. Co.*, 22 *Conn.* 83.

Most of these cases proceed on the principle that

Indianapolis, &c. R. Co. v. Hartley.

the location of the track of the railroad on the highway is an additional burden and servitude upon the land, which would entitle the owner to additional compensation. Others go upon the ground that it is an exclusive appropriation by the railroad of the soil to its own use, which the owner had the right himself to use for any purpose not inconsistent with an easement in favor of the public, and for that reason have held it is taking private property for public use, and have required just compensation to be made. The case can be maintained on either or both grounds.

Neither the state nor the municipality has the power to grant away the private property of the citizen, and if corporations, *quasi* public, in the exercise of the right of eminent domain, with which they are clothed by the sovereign power of the state, seek to appropriate it to their exclusive use, every principle of justice demands that they should make just compensation, whether the property taken is of little or great value.

It is urged that the damages found by the jury are excessive. We do not think so.

By reason of excavating for the track of appellant's road, the grade of the street in front of the residence of appellees had to be materially lowered, so that ingress and egress by carriages from the street was rendered impracticable, and was made far more difficult for persons on foot than it had formerly been.

There is no evidence that it would have been necessary to lower the grade of the street, except for the location of appellant's road.

The damages sustained by the appellees are marked and appreciable, and there is no reason why the judgment should not be affirmed.

BY THE COURT.—Judgment affirmed.

People *ex rel.* Bloomington v. Chicago, &c. R. R. Co.

THE PEOPLE *ex rel.* CITY OF BLOOMINGTON
v. THE CHICAGO & ALTON RAILROAD
COMPANY.

Supreme Court of Illinois, 1873.

Highway. Duty of railway company to provide proper crossing.

The obligation imposed by the common law upon one who, for his own benefit, cuts through a highway, to furnish to the public a proper crossing, even though he acts under a license from the proper authorities, extends to railway corporations; and a railway company is not relieved of its duty to keep in proper condition its intersection with a highway, merely because of a slight alteration of the line of the highway so as to change the precise place of crossing, especially where the change has been made with the assent and co-operation of the company.

Query, whether a railway company could be required by the legislature to construct safe crossings at the intersection of streets laid out after the construction of the railway?

Appeal to the supreme court of Illinois from the circuit court for McLean county.

This was an application on behalf of the City of Bloomington for a mandamus to compel the Chicago & Alton Railroad Company to maintain a crossing at the intersection of its road with one of the streets of that city. The facts are fully stated in the opinion. The application for a mandamus was refused; and from this order the applicant appealed.

Ira J. Bloomfield, for the relator.

LAWRENCE, Ch. J.—This was an application on the part of the city of Bloomington to compel the Chicago & Alton Railroad Company to construct a crossing at

People *ex rel.* Bloomington v Chicago, &c. R. R. Co.

the intersection of their road and Front-street in said city. It appears that long prior to the building of the railway a public road led from Bloomington to Pekin, which was known as the Pekin road. The railway crossed this road at grade a short distance south of the place to which the present controversy relates. It was, however, a dangerous crossing, and in 1862 it was decided, with the concurrence of the railway company, to open out Front-street until it should intersect with the Pekin road, and to abandon the old crossing and construct a new one where Front-street would cross the railroad. At this point the railroad passed through a cut, and the crossing, being a bridge, would be safe alike for the company and the public. The company contributed one hundred dollars and transported three car loads of lumber without charges for freight, and the city paid one hundred and thirty dollars toward the bridge.

As soon as it was completed, the company closed the old crossing by a fence which it has maintained to the present time, and the travel has passed over the bridge and new road, which are now a part of Front-street. The bridge has now become unsafe, and the question presented by this record is whether the obligation to furnish a safe crossing to the public rests upon the railway company or the city.

It is a well-settled principle of the common law, resting upon the most obvious considerations of justice, that any person or corporation that cuts through a highway for the benefit of such person or corporation must furnish to the public a proper crossing, even though acting under a license from the proper authorities. We refer, of course, to cases where the legislative power has not in terms relieved the person or company that interferes with a highway from the necessity of removing any obstructions they may create. In the absence of such an express provision it is palpable that

People *et rel.* Bloomington v. Chicago, &c. R. R. Co.

a railway company is under obligation to leave every highway that it crosses in a safe condition for the use of the public.

As illustrating the common law rule we refer to *Queen v. Inhabitants of Ely*, 69 *E. C. L.* 483.

But independently of the duties imposed upon this respondent by the common law, the charter under which the road was constructed expressly required it to restore to its previous usefulness any highway that it might cross. While the charter of the existing company is silent upon this point, yet as it was created for the purpose of purchasing the franchises of the pre-existing companies and the road built by them, and has so purchased, it must be held to have assumed the same duties toward the public that were imposed by the preceding charters.

An obligation to keep up a crossing, imposed as a condition of the right to cross a highway, must be regarded as necessarily attaching to whatever person or corporation may be the owner of the road, as long as the right is exercised. It is a continuing condition inseparable from the enjoyment of the franchises.

Counsel for respondent do not deny these legal principles, but they insist that the existing road having been laid out by the township after the railway was built, the respondent is under no obligation to keep up the crossing. It is urged by counsel for the relator, in answer to this position, that the new crossing was established by the common consent of the company and the public as a substitute for the old one, and the same obligation rests upon the company in regard to the existing crossing that it assumed in regard to the old Pekin road when it first laid its track across that road. The evidence in the record compels us to the same conclusion. The township authorities declined to act in regard to the extension of Front-street so as to change the place of crossing the railway, until the

People *ex rel.* Bloomington v. Chicago, &c. R. R. Co.

assent and co-operation of the company were secured. It was for its interest the change should be made, as the former crossing was dangerous, and accidents had already occurred. As the city should increase in population these accidents would increase in number, thus exposing the railroad company to frequent litigation and heavy loss. The consideration furnished ample motive for desiring a change, and when the new crossing was made the old one was at once closed by the company against the public. To secure this change the company had been willing to contribute freely toward the expense. Having thus secured such a change in the place of crossing as it desired, it cannot be permitted to claim that it has also accomplished a result which could not have been in the contemplation of the parties at the time, and relieved itself forever of a liability which is admitted to have existed in regard to the old crossing.

It is not necessary to discuss the question whether the legislature could authorize the city of Bloomington to require the railway company to construct safe crossings at the intersections of all streets, without reference to the question whether the streets were laid out before or after the construction of the railway. Although, by way of distinction, we have spoken of the crossing in question as a new crossing, it is in fact merely the removal of an old crossing to a new place, some three hundred feet distant. The road leading out of Bloomington towards Pekin was changed from an oblique to a straight course, but it was but the substitution of one line for another, and this having been done with the full concurrence of the company, the new crossing, so far as concerns the liability of the company, stands in place of the old. If the railway company was bound to keep in proper condition its intersections with highways that it might cross in the process of construction, is apparent that it would not

Jackson, &c. Co. v. Philadelphia, &c. R. R. Co.

be relieved of its obligation merely because of a slight deflection of a highway by the proper authorities so as to change the precise place of crossing, and such a claim becomes the more unreasonable when the change has been made with the full concurrence and co-operation of the company.

We are of opinion that a peremptory mandamus should be awarded.

SCOTT, J., took no part in this decision.

By THE COURT.—Order reversed and remanded.

THE JACKSON AND SHARP COMPANY v. THE
PHILADELPHIA, WILMINGTON AND
BALTIMORE RAILROAD
COMPANY.

Court of Chancery of Delaware, 1872.

License to construct and use side track.—Elstoppel.—The owners of certain car-works, near the line of the defendants' railway, having applied to the defendants for a connection of their works by a side track with the railway, their application was granted and the track built at their expense. They continued to use the track for several years for the delivery of freight and cars, expending meantime large sums of money in the extension of their works, and in the erection of new buildings, to which the side track connection with the railway was extended in a similar manner. A controversy arose between the parties, and the defendants gave notice of their intention to remove the side track; whereupon the owners of the car works filed a bill in equity praying an injunction to restrain the defendants from taking up such track, and a temporary injunction obtained. Upon the hearing, the evidence not showing any contract, express or implied, for the perpetual use of the side track by the complainants,—*Held*, that the transaction between the parties

Jackson, &c. Co. v. Philadelphia, &c. R. R. Co.

was merely a parol license for the permissive use of the side track; and such license was not rendered irrevocable, under the doctrine of equitable estoppel, by the fact that the complainants had expended large sums of money on the faith of its indefinite continuance.

A claim to the perpetual use of a side track connecting a railway with adjoining premises, appurtenant to such premises, passing with the title to them, and binding the land of the railway company into whosoever hands it may come, cannot be sustained by a mere parol license to construct and use such a track. Such a right is an easement or interest in land which cannot, at law, be created or transferred by license. Nor will the revocation of such a license be restrained, in equity, on the ground of equitable estoppel, because of the expenditure of large sums of money by the licensee, relying upon its continuance, where no fraud is shown. The principle of equitable estoppel is applied solely to prevent fraud.

In chancery of Delaware.

This was a suit in equity praying an injunction to restrain the defendant from taking up a side-track which connected the complainants' railroad car-works with the defendant's railway.

The complainants' works were erected by their predecessors in the business, Jackson & Sharp, about the year 1863, upon land adjacent to the defendants' track. About that time application was made to the defendants by Mr. Jackson, of Jackson & Sharp, for a side track connection between their works and the railway, which was granted, and two or three months afterward the connection was made by extending to the car-works a side track already built over the lands of other owners adjoining the complainants' premises. The work was done by employes of the railway company, under direction of its officers, but the expense was apportioned between the owners of the lands over which the track was laid. Afterwards, upon the erection by Jackson & Sharp of other buildings for shops, the track was extended to them in a similar manner. Jackson & Sharp continued to use the side tracks for their convenience in delivering freight and railway cars until they were

Jackson, &c. Co. v. Philadelphia, &c. R. R. Co.

succeeded by the complainants, by whom such use was continued, without objection or interruption, until 1870. A controversy having arisen between the parties, the railway company gave notice of their purpose to take up the side track ; whereupon this bill was filed, and a temporary injunction was granted.

T. F. Bayard, and S. M. Harrington, for the complainants.

N. B. Smithers, and G. C. Gordon, for the defendants.

BATES, C.—The claim made on the part of the complainants to the perpetual use of the side track in controversy as a legal right is based upon two grounds. One of these is, that the right was acquired by contract between their predecessors, Jackson & Sharp, and the railroad company ; the other, that even were there in the first instance no contract, but only a permissive use of the track under a license, still that the license, having been acted upon in the expenditure of large sums of money on the faith of its indefinite continuance, has become irrevocable under the doctrine of equitable estoppel.

1. First, is the question of contract. Here it may be well to notice that the point to be inquired of is, not whether upon the application of Jackson & Sharp to the officers of the railroad company a side track was promised and afterward laid, but whether the transaction included a stipulation by the company, express or implied, for the perpetual use of the side track by Jackson & Sharp and their assigns, as a right appurtenant to the car works. Now, in the view which I take of the facts, it becomes immaterial that the right claimed is an interest in real estate, such that under the statute of frauds a contract for it is required to be in writing ; for it seems quite certain upon the proofs that there

Jackson, &c. Co. v. Philadelphia, &c. R. R. Co.

was no contract, either written or verbal, conceding to Jackson & Sharp and their assigns the perpetual use of this side track as a right, or in any degree restricting the power of the railroad company, as owners of the soil, to take it up at their pleasure. The case, upon the question of express contract, rests on the testimony of Mr. Jackson, of the firm of Jackson & Sharp, and Mr. Felton, the then president of the railroad company, who represented the parties in the original transactions, and between whom the contract, if there were any, must have been effectuated. Both these gentlemen testify with evident candor and caution, and without any material discrepancy in their statements. The result of their testimony is, that at some time early in the commencement of the car work enterprise, after the selection of the site for the works, but whether before or after their erection does not appear, Mr. Jackson, on behalf of his firm, applied to the officers of the railroad company for a connection between the car works and the railroad. The application was acceded to, and after some delay the connection was made, deliveries of freight and manufactured cars being meanwhile effected by temporary expedients. Not a word, however, appears to have passed, intended to define the respective rights of the parties in the side track after it should be laid, or to prescribe any term or condition of its continuance, whether, on the one hand, it should remain for the permanent accommodation of the car works as an easement appurtenant to them, and beyond the power of the railroad company to terminate it, or whether, on the other hand, its continuance was to depend upon the mutual interest and good-will of the parties. Mr. Jackson does not state that there was any stipulation for the permanence of the side track—not even that he understood such to be the purport of the promise to lay the track made in response to his application for it. Mr. Felton, the president of the

Jackson, &c. Co. v. Philadelphia, &c. R. R. Co.

railroad company, under whose direction the connection was made, negatives any such stipulation by stating, in substance, that he directed the connection in the usual course of the granting of such accommodations, and subject to the general understanding in such cases, that the tracks forming the entire connection should remain under the control of the respective owners of the land on which different portions of it might be laid, without prejudice (as he must be understood to mean) to any rights of property on either side. It may then be safely concluded that there was no express contract.

But it was argued that a contract may be implied from the acts of the parties. And the principle sought to be applied at this point of the argument was one announced by GIBSON, Ch. J., in the Pennsylvania cases of *Rerick v. Kern*, 14 *Serg. & R. (Pa.)* 267, and *Swartz v. Swartz*, 4 *Barr (Pa.)* 353, that the grant of a privilege which is accessory to a permanent business is presumed to be commensurate in duration with the business, and although at first but a license, and as such revocable, yet that when acted upon in the expenditure of money it becomes a contract for a valuable consideration, to be executed by a court of equity as a contract part performed. It will be observed that this principle must depend, for its application to any particular case, upon the presumed intent of the parties that the privilege granted in such case should be commensurate with the business to which it might be accessory *as a right in all events*, and not as an arrangement depending upon the will of the parties for its continuance. Ordinarily, such a presumption may be a reasonable one. In the Pennsylvania cases it was clearly so. But, after all, this presumption, or, to speak more accurately, this inference as to the intent of the parties, is one controlled by the circumstances of the particular case, and may be wholly countervailed by evidence demonstrative that the privilege in question was in fact granted and

Jackson, &c. Co. v. Philadelphia, &c. R. R. Co.

accepted not as a perpetual, indefeasible right, but as a voluntary accommodation, to abide the good will and mutual interests of the parties. Such in the present case is the construction which the evidence obliges me to give to the acts of the parties. As this view is the one decisive of the case, some explanation of the reasons for it is due to counsel.

In the first place, then, I lay out of consideration, as a ground for inferring the concession of a perpetual right to the use of this side-track, the great value of such a right to the ownership of the car works. For opposed to this, as a ground for such an inference, is a consideration of hardly less force, which is the interest of the railroad company to preserve unimpaired its proprietary control over its road-bed and side track. And in addition to this is its obligation as a public corporation to keep its road, while held for the purposes of the incorporation, unincumbered by private rights or easements of a permanent nature, such as might under any circumstances embarrass its use as a public highway of travel,—an obligation held in the late Pennsylvania cases, to be of so much force as to qualify the doctrine of *Rerick v. Kern*, that a license is presumed to be commensurate with the business to which it is accessory, leaving that doctrine not applicable to licenses by railroad companies affecting lands held by them to corporate uses. *Heyl v. Philadelphia, &c. R. R. Co.*, 51 *Pa. St.* 469; *Wunderlich v. Cumberland Valley R. R. Co.*, a late case in the supreme court of Pennsylvania, not yet reported. The principle of these cases does not go so far as to preclude a railroad corporation from granting private rights or easements in its lands, to be exercised subject to its paramount obligations to the public; but it offers a strong ground against presuming such grants in the absence of express stipulations,—such as would be proper in order definitely to

Jackson, &c. Co. v. Philadelphia, &c. R. R. Co.

limit or qualify the rights granted, as rights subordinate to the public obligations of the company.

It is clear then that the relative interests of these parties, the one in acquiring and the other in withholding a perpetual easement in the side track, can afford no legitimate ground of inference as to whether or not the track was laid with an intent to confer such an easement. That was a question to be determined rather by the transactions between the parties than by their respective interests.

Taking up then, for this purpose, the evidence of the transactions between the parties, I am met at the outset by a fact of irresistible force, disclosed in the testimony of Mr. Felton, the then president of the railroad company, by whom the side track was directed to be laid, viz: that the track was laid according to the usual course of granting such accommodations by the company to business establishments located along its road, it being the general understanding in such cases that the continuance of the accommodation was to be voluntary on both sides, prejudicing no right of property in the soil, but leaving to the company the absolute control over its own track, with the like control in the owner of the connected works over the track laid upon his land. And it further appears that it was with this reserved control, tacitly understood by the parties concerned, that the connections similar to the one in question had been made between other works and this same side track, prior to its extension northward of Seventh-street to the car works of Jackson & Sharp,—on which latter point Mr. Felton is corroborated by testimony drawn from the connected works below Seventh-street. Against the force of this evidence the testimony of Mr. Jackson, who acted for his firm, proves not only no stipulation with him varying the usage obtaining under other connections of this nature, but not even his own understanding or impression that

Jackson, &c. Co. v. Philadelphia, &c. R. R. Co.

the railroad company intended to concede the perpetual use of the side track as a right, or upon any other than the usual tenure of such accommodations, viz: mutual interest and good will. And, then in addition to all this, is something quite inexplicable, upon the theory of a negotiation looking to a perpetual connection with the railroad, as a legal right appurtenant to the car works,—that is, the omission of Jackson & Sharp to seek a grant or contract in writing for securing a title so important; and the omission of the railroad company also in the concession of a right so seriously affecting their property, to impose some written conditions touching the maintenance and mode of using the side track. On the whole, gathering the intention of these parties, as we are left to do, from their acts, without any direct expression of it, I can construe this transaction only as a parol license for the permissive use of the side track, and not as a contract for the right, express or implied.

2. Let us then proceed to consider the case in the aspect of a license. On this branch of the case there are several material points upon which no controversy was raised in the argument. One of these is, that the right claimed for the complainants is to an easement or interest in the land of the railroad company, the claim being to the perpetual use of the side track as a right appurtenant to the car works, transmissible with the title to them, and binding the land of the company into whosoever hands it may come, at least so long as it shall be used for the purposes of a railroad. *Pitkin v. Long Island R. R. Co.*, 2 Barb. (N. Y.) Ch. 221, is a case very similar. Further, it is agreed that *at law* an estate or interest in land can be created only by deed or grant under seal, or by prescription, or in this country by twenty years' adverse possession or user; *in equity* such an interest may additionally be acquired by contract, which however must, under the statute of

Jackson, &c. Co. v. Philadelphia, &c. R. R. Co.

frauds, be in writing, subject to an exception of the equity arising out of part performance of a verbal contract. Again, it must be admitted that a license or permission to exercise some privilege upon the land of the licensor can create no estate or interest in the land, such as binds the land and is transmissible from the licensee, the utmost effect of a license being to confer a personal privilege, which is not assignable or transmissible, and is revocable at the licensor's pleasure. Nor does it matter whether the license be by parol or in writing, so long as it remains a mere license, not converted into a conveyance, grant, or contract, nor rendered irrevocable by estoppel, as under some circumstances, to be presently noticed, it may be, in equity though not at law. Few points have undergone more discussion, and have at length come to be better settled, than the insufficiency of a license at law to create or transfer an interest in land. In England the leading cases are *Fentiman v. Smith*, 4 *East*, 107; *Rex v. Herndon on the Hill*, 4 *M. & S.* 565; *Hemlins v. Shipman*, 5 *Barn. & C.* 22; 11 *E. C. L.* 207; *Bryan v. Whistler*, 8 *Barn. & C.* 288; 15 *E. C. L.* 219; *Cocker v. Cowper*, 1 *C. M. & R.* 418; and *Wood v. Leadbitter*, 13 *Mees. & W.* 838, in which last case the prior course of decisions is very fully reviewed. In this country the same rule was adjudged, as early as 1814, by Ch. J. PARSONS, in *Cook v. Stevens*, 11 *Mass.* 533. He has been followed in many of the states: *Mumford v. Whitney*, 15 *Wend. (N. Y.)* 384; *Foot v. New Haven, &c. R. R. Co.*, 23 *Conn.* 214; *Foster v. Browning*, 4 *R. I.* 47; *Den v. Baldwin*, 21 *N. J. L. (1 Zab.)* 390; *Hays v. Richardson*, 1 *Gill & J. (Md.)* 38; *Carter v. Harlan*, 6 *Md.* 20; *Bridges v. Purcell*, 1 *Dev. & Bat. (N. C.)* 492.

But it was earnestly urged that although a license is revocable so long as it is executory and the parties remain *in statu quo*, it ceases to be so, under the doctrine of equitable estoppel, after it has been executed,

Jackson, &c. Co. v. Philadelphia, &c. R. R. Co.

the licensee having expended money or otherwise involved himself so that he cannot recede without prejudice; that in this case, Jackson & Sharp having made large expenditures in erecting and afterward enlarging their car works upon the faith of their enjoying the continued use of this side track, the railroad company are equitably estopped from revoking the license.

Were this a case in a court of law, the answer would be that *at law* a license can under no circumstances become irrevocable by estoppel *when the effect would be to create an interest in land*. The doctrine of equitable estoppel, although largely adopted in courts of law and frequently so applied as to render licenses irrevocable, has been held not to apply to licenses, which if rendered perpetual would amount to an easement in lands. The reason is a plain and necessarily conclusive one, viz: that courts of law do not recognize mere equities, such as arise out of an equitable estoppel enforced against the legal owner of the lands; but they deal only with legal estates, such as are acquired through legal forms of conveyance—or their equivalent under the statute of limitations, an adverse possession of twenty years—or at least by writing under the statute of frauds. Hence, a mere license affecting lands is at law always revocable, even though granted for a valuable consideration, as in *Fentiman v. Smith*, 4 *East*, 107, and *Wood v. Leadbitter*, 3 *Mees. & W.* 832, and although the licensee may have expended money under it, which was a feature of many of the cases before cited.

It is true, however, that in this court equities in land, though not created by any deed, grant, or writing whatever, but springing out of the acts and relations of the parties, are largely enforced, and among these a large class are those which arise under the doctrine of equitable estoppel applied to prevent constructive fraud; as where one having title to land is knowingly

Jackson, &c. Co. v. Philadelphia, &c. R. R. Co.

silent in the presence of an innocent purchaser from a third person, or where one knowing his title to land silently permits another ignorantly to build on it. In these and in like cases this court, in order to prevent fraud, will raise out of the transaction an equity in favor of the party misled, binding the conscience of the owner and restraining the exercise of his legal rights against such party. No reason is perceived why, in a proper case, the same principle should not in equity restrain the revocation of a privilege affecting the use of land. But it must be carefully observed, that this principle of equitable estoppel proceeds upon the ground of *preventing fraud*. Its effect when applied is to restrain a party from exercising his legal right, and this even a court of equity cannot do unless there has been on his part some conduct, declaration, or improper concealment, misleading an innocent person to his prejudice, and rendering the assertion of the legal right as against such person an act of bad faith, amounting to constructive fraud. Moreover, it may be well added that to warrant the interference of the court with the legal right or title of a party, the case relied on to work the estoppel must be clear beyond doubt upon the facts. And the more stringently do these rules apply in a case such as this, where the effect of the estoppel, if allowed, will be to convert what was originally a bare privilege, temporary and revocable, into an easement in the licensor's land, perpetually binding it and transmissible from the licensee.

It is a fatal infirmity in this branch of the complainant's case that there was nothing in all the communications had between the officers of the company and Jackson & Sharp, or in the conduct of these officers, to justify Jackson & Sharp in assuming that the company, by granting the accommodation applied for, intended to relinquish any right of property in the soil. It is agreed that no stipulation or promise to that

Jackson, &c. Co. v. Philadelphia, &c. R. R. Co.

effect was expressed. For reasons before fully stated and which need not be repeated, Jackson & Sharp were not warranted to infer so grave a concession by the company as the relinquishment of its proprietary control over its soil from the bare fact that on their application the side track was laid, nor from its importance as a right appurtenant to the car works ; nor did the general usage connected with the granting of this sort of accommodation by the railroad company justify the inference that a perpetual easement in this track was conceded ; but the usage was to the contrary. Looking to all the circumstances of the case, it is my conviction that although the connection of the car works with the railroad was doubtless contemplated on both sides as one to be in fact permanent, yet that no stipulation to that effect was asked or given, or supposed by either party to have been given ; but that the arrangement was tacitly left to rest upon the general understanding with respect to such accommodations—Jackson & Sharp either not anticipating the contingency which has now happened, or trusting to the mutual interest and good will of the parties as a sufficient guarantee for the permanence of the connection, without securing it as a legal right according to prescribed forms of law. Their disappointment certainly involves them in no little hardship. But hardship is not a ground for equitable relief, except in favor of one who, without negligence in securing his rights by the appropriate legal modes, has been misled to his prejudice through some fraud or laches of the party against whom the relief is sought, or by such conduct of the latter as renders it an act of bad faith to take advantage of the mistake.

The injunction must be dissolved and the bill dismissed.

Bill dismissed.

Marsh v. Fairbury, &c. R. Co.

**MARSH v. THE FAIRBURY, PONTIAC, & NORTH-
WESTERN RAILWAY COMPANY.**

Supreme Court of Illinois, 1878.

Agreement as to location of railway depot. Specific performance. A bill in equity by a private individual for the specific performance of a contract by a railway company to locate its depot at a particular place, cannot be sustained. Specific execution of a contract in equity is not a matter of absolute right in the party, but of sound discretion in the court; and as railway companies are incorporated for the public good, the court must, in such a case, have regard to the interests of the public, and leave the complainant to his remedy by action for damages.

Appeal to the supreme court of Illinois. e

This was a bill in equity to enforce specific performance of an agreement by the defendant to locate its passenger and freight depot in Fairbury at a certain point. A demurrer to the bill was sustained by the court below, from which decree the complainant appealed.

A. E. Harding, for the complainant.

SHELDON, J.—This was a bill in chancery filed to enforce the specific performance of a contract made by the Fairbury, Pontiac, & North-western Railway Company “to locate passenger and freight depots of said road in Marsh’s addition to Fairbury and at no other point in said town.” The court below sustained a demurrer to the bill, and dismissed it. This is not a case which concerns merely the private interests of two suitors. It is a matter where the public interest is involved. Railroad companies are incorporated by authority of

Marsh v. Fairbury, &c. R. Co.

law, not for the promotion of mere private ends, but in view of the public good they subserve. It is the circumstance of public use which justifies the exercise on their behalf of the right of eminent domain in the taking of private property for the purpose of their construction. They have come to be almost a public necessity, the general welfare being largely dependent upon these modes of intercommunication and the manner of carrying on their operations. The specific execution of a contract in equity is a matter not of absolute right in the party, but of sound discretion in the court, and in deciding whether specific performance should be enforced against a railway company, the court must have regard to the interests of the public. *Raphael v. Railway Co., Law Rep. 2 Eq. Cases, 87.* The location of railroad depots has much to do with the accommodation of the wants of the public. And when once established a change of affairs may require a change of location in order to suit public convenience. We can not admit that an individual is entitled to call for the interference of a court of equity to compel a railroad company to locate unchangeably its depot at a particular spot to subserve the private advantage of such individual. Railroad companies, in order to fulfill one of the ends of their creation, the promotion of the public welfare, should be left free to establish and re-establish their depots wheresoever the accommodation of the wants of the public may require. To grant the relief asked for by complainant we would regard as against public policy, and he must be left for whatever remedy he may have to his suit at law for damages. The court below properly sustained the demurrer, and dismissed the bill

BY THE COURT.—Decree affirmed.

Walker v. City of Cincinnati.

WALKER v. CITY OF CINCINNATI.

Supreme Court of Ohio, 1872.

Legislative power. Municipal aid to railways. The principle that, independent of constitutional prohibitions, a statute authorizing a municipal corporation to aid by stock subscriptions in the construction of a railway having a special relation to the business and interests of the municipality, is within the general scope of legislative power, extends to an act authorizing a city, through trustees, to construct a railway entirely at its own expense, and to levy taxes to pay the cost of construction, if such railway is essential to the interests of the city; and upon the question as to the probable benefit of a particular railway to the municipality, the decision of the majority of the corporation, acting under legislative sanction, will not be reviewed by the courts.

As the public or corporate interest in an improvement, rather than its location, determines the question of the right of taxation for its construction, the fact that a railway proposed to be built under such a statute by a municipal corporation will lie mainly in another state can make no difference.

The Ohio act of 1869,—providing that any one of certain cities shall be authorized to construct a railway leading therefrom to any other terminus in that state or any other state, through the agency of a board of trustees to be appointed by a specified court of such city, after a majority of the city council shall have declared such railway to be essential to the interests of the city, and the undertaking shall have received the sanction of a majority of the electors of the city at a special election,—is not in conflict with the provisions of the constitution of the State.

1. Such an act, by authorizing the judges of the courts named to appoint trustees, does not exercise an appointing power which is forbidden to the legislature by section 27 of article 2 of the constitution.

2. Neither does the act violate the provision of section 14 of article 4 of the constitution, prohibiting judges from holding other offices. The appointment of trustees is the exercise of a judicial function.

Walker v. City of Cincinnati.

3. The omission of the act to fix the term of office and compensation of the trustees is not contrary to section 20 of article 2 of the constitution, requiring the legislature to fix the term of office and compensation of all officers not provided for. The trustees are not officers within the meaning of that clause.

4. The act is not in violation of section 6 of article 8 of the constitution, forbidding the legislature to "authorize any county, city, town, or township, by vote of its citizens, or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever; or to raise money or loan its credit to or in aid of any such company, corporation, or association." The mischief interdicted is a business partnership between a municipality and individuals, or private corporations or associations. The provision is not to be construed so as to prohibit municipal corporations from making improvements on their own account and with their own means.

Appeal to the supreme court of Ohio.

The facts in this case, and the questions presented, are fully stated in the opinion.

SCOTT, J.—The question presented by this case is as to the constitutionality and validity of the act of the general assembly of this state, passed March 4, 1862, entitled "An act relating to cities of the first class having a population exceeding one hundred and fifty thousand inhabitants."

The general scope and purpose of the act is to authorize any such city to construct a line of railroad leading therefrom to any other terminus in this state or in any other state, through the agency of a board of trustees consisting of five persons, to be appointed by the superior court of such city, or if there be no superior court then by the court of common pleas of the county in which such city is situated. The enterprise cannot, however, be undertaken until a majority of the city council shall, by resolution, have declared such line of railway to be essential to the interests of the city, nor until it shall have received the sanction of

Walker v. City of Cincinnati.

a majority vote of the electors of the city, at a special election to be ordered by the city council, after twenty days' public notice.

For the accomplishment of this purpose the board of trustees is authorized to borrow a sum not exceeding ten millions of dollars, and to issue bonds therefor in the name of the city, which shall be secured by a mortgage on the line of railway and its net income, and by the pledge of the faith of the city, and a tax to be annually levied by the council, sufficient with such net income to pay the interest and provide a sinking fund for the final redemption of the bonds.

In pursuance of the authority which this act purports to give, the city council of Cincinnati has resolved that it is essential to the interests of that city that a line of railway to be named "The Cincinnati Southern Railway" shall be provided between the said city of Cincinnati and the city of Chattanooga, in the state of Tennessee, and this action of the council has been indorsed and approved by a vote of more than ten to one of the electors of the city at an election duly ordered and held pursuant to the requirements of the act. But fifteen hundred of the electors of the city voted against the proposed project, and the grave question here presented, on behalf of these unwilling electors and tax-payers, is whether it is within the power of the state legislature to authorize the taxation of their property by the municipality for the purpose of constructing such a line of railway by the means and in the manner prescribed in the act. The consequences which may reasonably be expected to result from the exercise by municipal corporations of powers such as this act purports to confer, both in respect to public and private interests, are so momentous as to make it difficult to over-estimate the importance of the question, and to demand at our hands the most careful investigation and deliberate consideration.

This is the first instance in the history of the state, so far as we are aware, in which the general assembly has undertaken to authorize municipalities to embark in the business of constructing railroads, on their own sole account, as local improvements. The railway contemplated in this instance is several hundred miles in length, extending into other states; the sum authorized to be expended in its construction is a large one, and, should it prove inadequate for the completion of the road, we may reasonably expect it to be increased by subsequent legislation. These considerations, and the apparent abuse of discretion involved in declaring such a work to be so far *local* in its character as to justify its construction by a single city, at the sole expense of its citizens, all give a high degree of interest to the question. But we must bear in mind that the question is one of legislative *power*, and not of the wisdom, or even of the justice, of the manner in which that power, if it exists, has been exercised. Had we jurisdiction to pass upon the latter question we should probably have no hesitation in declaring the act under review to be an abuse of the taxing power.

Let us, then, first inquire under what conditions it becomes competent for the judiciary to declare an attempted act of legislation, formally enacted by the general assembly, to be invalid, by reason of unconstitutionality. Courts cannot, in our judgment, nullify an act of legislation on the vague ground that they think it opposed to a general "latent spirit" supposed to pervade or underlie the constitution, but which neither its terms nor its implications clearly disclose in any of its parts. To do so would be to arrogate the power of making the constitution what the court may think it ought to be, instead of simply declaring what it is. The exercise of such a power would make the court sovereign over both constitution and people, and convert the government into a judicial despotism.

Walker v. City of Cincinnati.

While we declare that legislative power can only be exercised within the limits prescribed by the constitution, we are equally bound to keep within the sphere allotted to us by the same instrument. On this subject we cannot do better than adopt what is well said by Judge COOLEY in his treatise on "Constitutional Limitations," pp. 128, 129, when, in speaking of limitations upon legislative authority, he says: "Some of these are prescribed by constitutions, but others spring from the very nature of free government. *The latter must depend for their enforcement upon legislative wisdom, discretion, and conscience.* The legislature is to make laws for the public good, and not for the benefit of individuals. It has control of the public moneys, and should provide for disbursing them for public purposes only. Taxes should only be levied for those purposes which properly constitute a public burden. But what is for the public good, and what are public purposes, and what does properly constitute a public burden, *are questions which the legislature must decide upon its own judgment; and in respect to which it is vested with a large discretion which cannot be controlled by the courts, except, perhaps, where its action is clearly evasive, and where, under pretense of a lawful authority, it has assumed to exercise one that is unlawful.* Where the power which is exercised is legislative in its character, *the courts can enforce only those limitations which the constitution imposes, and not those implied restrictions which, resting in theory only, the people have been satisfied to leave to the judgment, patriotism, and sense of justice of their representatives.*"

And he adds on page 171: "Nor are the courts at liberty to declare an act void because, in their opinion, it is opposed to a *spirit* supposed to pervade the constitution, but not expressed in words." Citing *People v. Fisher*, 24 *Wend.* (N. Y.) 220; *Cochran v. Van*

Walker v. City of Cincinnati.

Surley, 20 *Id.* 381 ; People v. Gallagher, 4 *Mich.* 244 ; Benson v. Albany, 24 *Barb.* (N. Y.) 252 ; Grant v. Courter, *Id.* 232 ; Wynehammer v. People, 13 *N. Y.* 391.

We do not understand it to be claimed that the act in question is an assumption of any of the powers specially delegated to the general government by the constitution of the United States, nor that it is an encroachment upon the functions and powers conferred by the state constitution on other departments of the government, and therefore impliedly withheld from the general assembly. The only questions, therefore, with which we have to deal are : First, whether the act is within the general grant of legislative power which the constitution declares to be vested in the general assembly ; and, second, does it contravene any of the limitations upon the exercise of legislative power, which are either expressed or clearly implied in any of the provisions of that instrument. And before we can answer the former question in the negative, or the latter in the affirmative, our convictions must be clear and free from doubt. Lechman v. McBride, 15 *Ohio*, 291 ; C., W. & Z. R. R. Co. v. Clinton County, 1 *Id.* 77, and authorities there cited.

Let us then consider, first, whether this act is within the general scope of legislative power, independent of special constitutional prohibitions. That it is within the legitimate scope of legislative power to authorize a municipality of the state to aid in the construction of a public improvement such as a railroad, by becoming a stockholder in a corporation created for that purpose, and to levy taxes to pay the subscription, must be regarded as fully settled in this state by repeated adjudication. In the case of C., W. & Z. R. R. Co. v. Clinton County, 1 *Ohio*, 77, the subject was very fully considered, and it was held that, as the State may itself construct roads, canals, and other descriptions of in-

Walker v. City of Cincinnati.

ternal improvements, so it may employ any lawful means and agencies for that purpose, among which are private companies incorporated for the construction of such improvements. And it was said that, for much stronger reasons, counties might be authorized to construct works of a similar kind, of a local character, having a special relation to their business and interests.

And as the state might contract or authorize the counties to construct these works entire, or create corporations to do it entire, it was held that, as a question of power, each might be authorized to do a part. The validity of subscriptions to the stock of railroad corporations, made by counties, cities, towns, and townships of the State, under special legislative authority, has been drawn in question in many cases which have since come before this court, and in none of them has the authority of the legislature to grant such power of subscription been doubted (1 *Ohio*, 105; *Id.* 153; 2 *Id.* 607; *Id.* 647; 6 *Id.* 280; 7 *Id.* 327; 8 *Id.* 394; *Id.* 564; 11 *Id.* 183; 12 *Id.* 596; *Id.* 624; 14 *Id.* 260; *Id.* 472; *Id.* 569); and the cases in which such legislative authority has been upheld by the courts of last resort in other States are too numerous even for reference. A list of more than fifty such cases may be found in Judge COOLEY's treatise, before referred to, p. 119, note 4.

If we even admit that all these decisions have been unwise, yet it is clearly too late to overrule them in this state. Were the question a new one, and properly determinable by the judgment of a court, we should perhaps concur in opinion with Judge REDFIELD, that subscriptions for railway stock by cities and towns do not come appropriately within the range of municipal powers and duties. Yet he is constrained to add that "the weight of authority is all in one direction, and it is now too late to bring the matter into serious debate." 2 *Redfield on Railways*, 398, 399, note. And if, in the absence of constitutional prohibitions, a municipal cor-

Walker v. City of Cincinnati.

poration may be authorized to aid by stock subscriptions in the construction of a railway, which has a special relation to its business and interests, upon what principle shall we deny that it can be authorized to construct it entirely at its own expense, when its relation is such as to render it essential to the business interests of the municipality? And upon the question of fact, whether a particular road is thus essential to the interests of the city, this court, in the case of the C., W. & Z. Railroad v. Clinton County, 1 *Ohio St.* 77, already referred to, quote approvingly from the case of *Goodin v. Crump*, 8 *Leigh (Va.)* 120, in which it was said: "If, then, the test of the corporate character of the act is the probable benefit of it to the community within the corporation, who is the proper judge whether a proposed measure is likely to conduce to the public interest of the city? Is it this court, whose avocations little fit it for such inquiries? Or is it the mass of the people themselves—the majority of the corporation acting (as they must do if they act at all) under the sanction of the legislative body? The latter assuredly."

And in *Sharpless v. Philadelphia*, 21 *Pa. St.* 147, it was said by BLACK, Ch. J.: "If the legislature may create a debt, and lay taxes on the whole people to pay such subscriptions, may they not with more justice and greater propriety, and with as clear a constitutional right, allow a particular portion of the people to tax themselves to promote in a similar manner a public work in which they have a special interest? I think this question cannot be answered in the negative. . . . I cannot conceive of a reason for doubting that what the state may do in aid of a work of general utility, may be done by a county or a city for a similar work, which is especially useful to such county or city, provided the state refuses to do it herself and permits it to be done by the local authorities." The question in that

Walker v. City of Cincinnati.

case was upon the validity of subscriptions of stock made by the city of Philadelphia in aid of two railroads. One of these was the Hempfield Road, which had its eastern terminus at Greensburg, three hundred and forty-six miles west of Philadelphia. Both subscriptions were sustained, and the court said: "It is the *interest* of the city which determines the right to tax her people. That interest does not necessarily depend on the mere location of the road. . . . But it is not our business to determine what amount of interest Philadelphia has in, either of these improvements. That has been settled by her own officers and by the legislature. For us it is enough to know that the city may have a public interest in them, and that there is not a palpable and clear absence of all possible interest perceptible by every mind at the first blush. All beyond that is a question of expediency, not of law, much less of constitutional law."

By the act under consideration no railroads are authorized to be constructed, except such as have one of their termini in the city which constructs them. And that a city has no peculiar corporate interest in such channels of commerce as lead directly into it, is a proposition which, to say the least, is very far from being clearly true. And as the public or corporate interest in an improvement rather than its particular location determines the question as to the right of taxation for its construction, the fact that the road contemplated in the present case will lie mainly outside of this state can make no difference. The right of eminent domain cannot be exercised, nor the road constructed in or through other states, without their permission and authority; and the act in question contemplates nothing of the kind. But when such consent is given we suppose the particular direction given to the road can have no bearing on the question of corporate power to construct it. It is also to be borne in mind that this is not

Walker v. City of Cincinnati.

a case in which the legislature has determined a particular public improvement to be of a local character, and has imposed the burden of its construction on an unwilling municipality. But it is the case of an authority given to a city to exercise its powers of taxation only for the construction of an improvement which the local authority have declared to be essential to the interest of the city, and even that cannot be done till a majority of its people have sanctioned the measure by their deliberate votes.

The towns and cities of the state are not the creations of the constitution. It recognizes these municipalities as existing organizations, properly invested by immemorial usage with powers of assessment and taxation for local purposes of a public character, but which were, nevertheless, subject to control and regulation by the state, and that these powers might be abused unless properly restricted. The constitution itself provides where the power of preventing such abuse shall be vested. It declares, in section 6 of article 13, that the "general assembly shall provide for the organization of cities and incorporated villages by general laws, and restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent the abuse of such power."

It is very clear that this constitutional mandate cannot be enforced according to judicial discretion and judgment. In the very nature of the case, the power which is to impose restrictions so as to prevent abuse, must determine what is an abuse, and what restrictions are necessary and proper. As is said by the learned author from whose treatise we have before quoted, "The moment a court ventures to substitute its own judgment for that of the legislature, in any case where the constitution has vested the legislature with power over the subject, that moment it enters upon a field where it is impossible to set limits to its authority, and

Walker v. City of Cincinnati.

where its discretion alone will measure the extent of its interference. The rule of law upon this subject appears to be that, except where the constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operates according to natural justice or not in any particular case. The courts are not the guardians of the rights of the people of the state, except as those rights are secured by some constitutional provision which comes within the judicial cognizance. The protection against unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fail, the people in their sovereign capacity can correct the evil; but courts cannot assume their rights." *Cooley's Const. Lim.* 167, 168.

We do not mean to say that every legislative enactment is necessarily valid, unless it conflict with some express provision of the constitution. Undoubtedly the general assembly cannot divest A of his title to property and give it to B. They cannot exercise judicial functions. They can impose taxes only for a public purpose. For it is of the essence of a tax that it be for a *public use*. Nor can they, by way of taxation, impose a burden upon a portion of the state only, for a purpose in which that portion of the state has no possible peculiar local interest. But to justify the interference of a court upon any of these grounds, the case must be brought clearly, and beyond doubt, within the category claimed, and such we are persuaded is not the case in respect to the act in question.

We have been referred to recent adjudications in several states, which are supposed to sustain the claim that taxation cannot be authorized for the construction of a railroad in cases like the present. In the case of *Whiting v. Sheboygan R. Co.*, 9 *Am. Law Reg.* 156, it was held that "a statute levying a tax for the sole

Walker v. City of Cincinnati.

purpose of making a direct gift of the money raised to a mere private railway, in which the state or the taxpayers have no ownership, is unconstitutional."

The case, from Michigan, of *People ex rel. Railroad Co. v. Salem*, 9 *Am. Law Reg. N. S.* 487, proceeds upon the same grounds. But in the case now before us, the road is the property of the taxpayers who furnish the means to build it. The recent decisions in Iowa are in conflict with the former uniform line of decisions on the subject in the same state, and in all the cases referred to in either of those states the reasoning upon which the decisions rest is in conflict with what we cannot but regard as the settled law of this state.

We are brought to the conclusion that there is nothing in the general purport and main object of this act which places it outside of the sphere of legitimate legislative power. We proceed to consider whether it is in conflict with any of the express limitations imposed by the constitution. It is claimed that the general assembly, in the act in question, by authorizing the judges of the superior court to appoint trustees of the contemplated railway, have exercised an appointing power which is forbidden by section 27 of the second article of the constitution. The argument is, that the trustees whom the act authorized the court to appoint are *public officers*; that their appointment is not the exercise of a judicial function, or of any power that can be conferred on the judges of the court *as such*, and that the conferring of this power of appointment is the creation of a new and independent office, which cannot be filled by the appointment of the legislature, whether the appointment be designated by name or by reference to another office which he holds. In the same connection it is claimed that this power of appointment is conferred on the judges of the superior court in violation of article 4, section 14, of the constitution, which

Walker v. City of Cincinnati.

prohibits the judges of the supreme court and the court of common pleas from holding any other office of profit or trust under the authority of this state or the United States. And it is further argued that the act is in conflict with article 2, section 20, of the constitution, because it does not fix the term of office and compensation of the trustees. Are any of these positions clearly well taken?

We shall first inquire whether the power of appointment conferred by this act on the judges of the superior court involves the exercise of an appointing power by the general assembly. Were the judges thereby appointed to a public office? In support of the affirmative of this question, we are referred to the decision of this court in the case of *State ex rel. Attorney General v. Kennon*, 7 *Ohio St.* 546. In that case it was held that the selection and designation by name of the defendants by the general assembly to exercise continuously and as a part of the regular and permanent administration of the government important public powers, trusts, and duties, is an appointment to office. But we think the present case cannot be brought within the principle of that decision. In this case there is no designation of individuals by name to exercise any public functions whatever. It is clearly the case of an additional power or duty annexed to existing offices, and not the creation of a new office. Upon the filing of a petition by the city solicitor in the superior court, praying for the appointment of trustees, it is made the duty of the judges of that court to make such appointment, and to enter the same on the minutes of their court. The power of appointment and of subsequent removal for unfaithfulness can be exercised only by the court as such, and all power of control in the premises on the part of the judges ceases with the termination of their judicial offices. It is true that the act confers a new power on the judges of the superior court, but, as

Walker v. City of Cincinnati.

was said by Judge SWAN in his concurring opinion in the case referred to, "if adding to the duties or powers of existing offices is an exercise of the appointing power, then every new duty required or power conferred upon any state, county, or township officer must be deemed the exercise by the general assembly of the appointing power, and forbidden by the constitution."

But it is said that the appointment of these trustees is not the exercise of a judicial function. Suppose this to be so. Does it follow that no functions except such as are purely judicial can be constitutionally annexed to the office of a judge? Can judges not be made conservators of the peace, and as such be required to discharge duties which are not of a judicial character? If no power of appointment to any office or position of public trust can be devolved upon a court or judge, it is certain that many of the statutes of this state are invalid. Quite a number of statutes have been referred to by counsel in which such power of appointment is given to probate judges, judges of the court of common pleas, and judges of the superior court. But is it clear that the selection and appointment of these trustees which the act requires to be made by the judges of the superior court, and to be entered on the minutes of the court, is in no sense a judicial act? It is the act of a court, and the selection of the trustees and the fixing the amount of their bonds require the exercise of judgment and discretion. Authorities are not wanting to show that such an act is properly judicial in its character.

Thus, where a statute of New York authorized a town to issue bonds to aid in the construction of a railroad, and made it the duty of the county judge to appoint under his hand and seal three commissioners to carry into effect the purposes of the act, it was held by the supreme court of that state that the act of making such appointment was judicial.

Walker v. City of Cincinnati.

"It was said by the court: "The action sought from the county judge is judicial. It is conferred by the statute upon the office of county judge, to be exercised under its seal. The duty requires the exercise of judgment and discretion in the selection of commissioners. The individual is in no way responsible for any act of those he may select in the discharge of their duties. In no sense is the act of selecting commissioners ministerial. They do not act on the command of the county judge. He issues no process to them. If after appointment the persons designated accept and act, they do so under and by virtue of the statute, and not in virtue of the order designating them as commissioners." *Sweet v. Hulbert*, 51 *Barb. (N. Y.)* 315. Nor do we think that these trustees are *officers* within the meaning of that clause of the constitution which provides that "the general assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers."

This clause cannot be regarded as comprehending more than such offices as may be created to aid in the permanent administration of the government. It cannot include all the agencies which the general assembly may authorize municipal and other corporations to employ for local and temporary purposes. These trustees have no connection with the government of the state, or of any of its subdivisions. They have nothing to do with the general protection and security of persons or property. Their sole duty is to procure and superintend the construction of a particular road, and to lease it when constructed. When this shall have been done, so far as appears from the act, their functions end. And in the road, when constructed, the state will have no proprietary interest. All the railroads of the state, though owned and operated by private corporations, are in an important sense public improvements, yet the officers who

Walker v. City of Cincinnati.

manage them and superintend their pecuniary interests are not public officers, within the meaning of this constitutional provision. No one supposes that the compensation of such officers must be fixed by the legislature.

It remains to consider, with reference to the general purpose and object of the act, whether there are in the constitution special limitations on the general legislative power vested in the general assembly which prohibits the authorizing of a city to raise, by taxation of its citizens, the means for constructing a railroad leading into such city, when such an improvement is deemed by a majority of the citizens to be essential to its interests. It is claimed that the grant of such authority is in violation of article 8, section 6, of the constitution, which reads as follows :

"Art. VIII. Sec. 6.—The general assembly shall never authorize any county, city, town, or township, by vote of its citizens, or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever ; or to raise money or loan its credit to or in aid of any such company, corporation, or association."

It is proper to consider this section in connection with the sections which precede it in the same article, and with some provisions found in other articles which bear more or less directly upon the same and kindred subjects.

The first two sections of this article enumerate the purposes for which the state may contract debts, and the third section declares that except the debts thus specified, "no debt whatever shall hereafter be created by or on behalf of the state." The fourth section declares that "the credit of the state shall not, in any manner, be given or loaned to or in aid of any individual, association, or corporation whatever, nor shall the state ever hereafter become a joint owner or stock-

Walker v. City of Cincinnati.

holder in any company or association, in this state or elsewhere, formed for any purpose whatever." The fifth section forbids the assumption by the state of the debts of any county, city, town, or township, or of any corporation whatever, unless such debts shall have been created to repel invasion, suppress insurrection, or defend the state in war. In article 12, section 6, it is declared "the state shall never contract any debt for purposes of internal improvement."

And article 13, section 6, provides as follows: "The general assembly shall provide for the organization of cities and incorporated villages by general laws, and restrict their powers of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent the abuse of such power." In *Cass v. Dillon*, 2 *Ohio*, 613, 614, it was held, and we think properly, that the limitations imposed upon the state by the first three sections of article 8 were not intended as limitations upon her political subdivisions, her counties and townships. And the clear implications of the fifth section are that counties, cities, towns, and townships may create debts to repel invasion, suppress insurrection, or defend the state in war, which the state may assume, and may also create debts for other purposes, which the state is forbidden to assume. By the fourth section a limitation is imposed in respect to the state similar to that prescribed in the sixth section in regard to counties, cities, towns, and townships. The state and her municipalities and subdivisions are clearly distinguished, and treated of separately. It is to the latter that the inhibitions of the sixth section relate. What are the extent and purport of those inhibitions? Its own language must furnish the answer to this question, if that language be plain and unambiguous. Of course, I do not mean that we are bound to adhere strictly to the letter, without regard to the evident meaning and spirit of the instrument. The funda-

Walker v. City of Cincinnati.

mental law of the state is to be construed in no such narrow and illiberal spirit. On the contrary, it is to be construed according to its intention where that is clear, and that which clearly falls within the reason of the prohibition may be regarded as embodied in it. Still it is very clear that we have no power to amend the constitution, under the color of construction, by interpolating provisions not suggested by the language of any part of it. We cannot supply all omissions, which we may believe have arisen from inadvertence on the part of the constitutional convention. Recurring, then, to the language of this section, it is quite evident that it was not intended to prohibit the construction of railroads, nor, indeed, to prohibit any species of public improvements.

The section contains no direct reference to railroads, nor to any other special classes of improvements or enterprises. The inhibitions are directed only against a particular manner or means by which, under the constitution of 1802, many public improvements had been accomplished. And its language is sufficiently comprehensive to embrace every enterprise involving the expenditure of money and the creation of pecuniary liabilities. Under the constitution of 1802 numerous special acts of legislation had authorized counties, cities, towns, and townships to become stockholders in private corporations organized for the construction of railroads, to be owned and operated by such corporations. The stock thus subscribed by the local authorities was generally authorized to be paid for by the issue of bonds, which were to be paid by taxes assessed upon the property of their constituent bodies. Many of these enterprises proved unprofitable, and the stock became valueless. Some of them wholly failed. Heavy taxation followed to meet and discharge the interest and principal of the bonds thus issued. Towns and

Walker v. City of Cincinnati.

townships were induced to attempt repudiation of their contracts.

And, as the records of this court abundantly show, the assessment and collection of the taxes which the preservation of good faith required, had repeatedly to be enforced by *mandamus*. In many, if not all of these cases, it was alleged that the stock subscriptions sought to be enforced had been voted for and made under the influence of false and fraudulent representations made by interested officers and agents of the corporation to be aided by the subscription. At the time of the formation and adoption of the present constitution these evils had begun to be seriously felt, and excited the gravest apprehensions of calamitous results. Under such circumstances, this section was made a part of the state constitution.

It may be well again to recur to its language: "The general assembly shall never authorize any county, city, town, or township, by vote of its citizens or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever, or to raise money for or loan its credit to or in aid of any such company, corporation, or association."

The mischief which this section interdicts is a business partnership between a municipality or subdivision of the state and individuals, or private corporations or associations. It forbids the union of public and private capital or credit in any enterprise whatever. In no project originated by individuals, whether associated or otherwise, with a view to gain, are the municipal bodies named permitted to participate in such manner as to incur pecuniary expense or liability. They may neither become stockholders, nor furnish money or credit for the benefit of the parties interested therein. Though joint stock companies, corporations, and associations only are named, we do not doubt that the reason of the prohibition would render it applicable

Walker v. City of Cincinnati.

to the case of a single individual. The evil would be the same whether the public suffered from the cupidity of a single person or from that of several persons associated together.

As this alliance between public and private interests is clearly prohibited in respect to all enterprises of whatever kind, if we hold that these municipal bodies cannot do on their own account what they are forbidden to do on the joint account of themselves and private partners, it follows that they are powerless to make any improvement, however necessary, with their own means, and on their own sole account. We may be very sure that a purpose so unreasonable was never entertained by the framers of the constitution.

Besides, if this section is to be construed so as to prohibit municipal corporations from making improvements on their own account and with their own means, then the fourth section of this same article, which is quite similar in language, must be held to prohibit the making of any improvements by the State, on her own account and with her own means. This would not only be highly unreasonable, but would conflict with the clear implications of the section which prohibits the State from *contracting any debt* for purposes of internal improvements.

This implies that the State may make all such improvements as will not involve the creation of a debt.

We find ourselves unable, therefore, upon any established rules of construction, to find in this section the inhibition claimed by counsel to arise by implication.

It may be, and indeed I think it very probable, that had the framers of the constitution contemplated the possibility of the grant to a municipal corporation of such powers as the acts under consideration confer, they would have interposed further limitations upon legislative discretion. But omissions of such a rare

Walker v. City of Cincinnati.

character surely cannot be supplied according to the conjectures of a court.

It is argued, however, that the trustees of the contemplated railway are a corporation, and that the act in question violates the terms of this section, by authorizing the city to raise money for and loan its credit to this corporation to enable them to construct a railroad.

We think it unnecessary to inquire whether the trustees provided for by the act are in any sense a corporation or not. For if they are an association or organization of any kind whatever, having a property interest in the road distinct from that of the city, then the objection is well taken. The inhibitions of this section are not directed against *names*.

But it is clear that these trustees are a mere agency through which the city is authorized to operate for her own sole benefit. Neither as individuals, nor as a board, have they any beneficial interest in the fund which they are to manage, or in the road which they are to build.

They are *in fact*, as well as *in name*, but *trustees*, and the sole *beneficiary* of the trust is the city of Cincinnati. They are authorized to act only in the name and on behalf of the city.

Looking therefore to the substance of things, this case cannot be brought within the terms of the prohibition unless we are to regard the city itself as being one of the corporations for which money is not to be raised, nor a loan of credit made.

We do not understand counsel as relying upon any other grounds of objection to the validity of this act than those which we have considered, and are of opinion that the judgment of the court below must be affirmed.

BY THE COURT.—Judgment affirmed.

ST. JOSEPH TOWNSHIP v. ROGERS.

Supreme Court of the United States; December Term, 1872.

Subscriptions by municipal corporations in aid of railroads. Unless expressly prohibited by a constitutional provision, a State legislature has power to authorize towns and counties through which a railway is located, to borrow money, issue their bonds, and subscribe for or purchase the stock of the railway company, to aid in constructing or completing the railroad. And in all cases where the legislature could have originally conferred the power, defective subscriptions may be ratified by subsequent legislation.

Validity of municipal bonds irregularly issued. Where the authority to issue its bonds in aid of a railroad is conferred upon a municipality, to be exercised in a special manner, and subject to certain regulations, conditions, or qualifications, and the bonds issued show by their recitals that the power was exercised in the manner required, and that they were issued in conformity with those regulations and pursuant to those conditions and qualifications, proof that any or all of those recitals are incorrect will not constitute a defense by the corporation to an action on the bonds or their coupons by an innocent holder for value, if it appears that it was the duty of the officers who executed the bonds to decide whether or not there had been an antecedent compliance with the regulation, condition, or qualification which, it is alleged, was not fulfilled.

Error from the supreme court of the United States to the circuit court for the northern district of Illinois.

This was an action upon certain bonds issued by the defendant township, to raise money for subscription to the capital stock of a railway company, under the circumstances set forth in the opinion. Verdict was rendered for plaintiff, by direction of the court; and from the judgment entered thereon defendant prosecuted this writ of error.

St. Joseph Township v. Rogers.

CLIFFORD, J.—Bonds, payable to bearer, issued by a municipal corporation to aid in the construction of a railroad, if issued in pursuance of a power conferred by the legislature, are valid commercial instruments; but if issued by such a corporation which possessed no power from the legislature to grant such aid, they are invalid, even in the hands of innocent holders.

Such a power is frequently conferred to be exercised in a special manner, or subject to certain regulations, conditions, or qualifications, but if it appears that the bonds issued show by their recitals that the power was exercised in the manner required by the legislature, and that the bonds were issued in conformity with those regulations and pursuant to those conditions and qualifications, proof that any or all of those recitals are incorrect will not constitute a defense to the corporation in a suit on the bonds or coupons, if it appears that it was the sole province of the municipal officers who executed the bonds to decide whether or not there had been an antecedent compliance with the regulation, condition, or qualification which, it is alleged, was not fulfilled.

On February 28, 1867, the legislature amended the articles of association of the Danville, Urbana, Bloomington and Pekin Railroad Company, and enacted that any incorporated town or township, in counties acting under the township organization law, along the route of said railroad, may subscribe to the capital stock of said company in any sum not exceeding two hundred and fifty thousand dollars. 2 *Priv. Laws* 1867, 761.

No such subscription, however, it was enacted, shall be made until the question has been submitted to the legal voters of such town or township in which the subscription is proposed to be made. Regulations are also enacted for taking the sense of the legal voters upon such a proposition, which provide that the clerk of the town or township, upon the presentation to him of a

St. Joseph Township v. Rogers.

petition stating the amount proposed to be subscribed, signed by at least ten citizens who are legal voters and taxpayers therein, shall post up notices in at least three public places in the municipality, not less than thirty days before the day of holding such election, notifying the legal voters thereof to meet at the usual place of holding elections, or some other convenient place named in the notice, for the purpose of voting for or against such subscription.

Prior to the passage of that act, however, an election was held in that township to determine whether the municipality would subscribe twenty-five thousand dollars to the capital stock of that railroad company, and the proofs show that a majority of all the legal voters of the township, voting at the election, voted for the subscription, sixty-two votes being cast in favor of the subscription, and seventeen against the proposition.

Pursuant to the vote at that election the supervisor of the township subscribed, in the name of the municipality, twenty-five thousand dollars to the capital stock of that railroad company, and executed, in the name of the township, the bonds held by the plaintiff, bearing interest at ten per cent. per annum, payable in ten years from date, which bonds were signed by the party issuing the same as such supervisor, and were attested by the clerk of the township.

Objection is made to the preliminary proceedings because the election approving the subscription was held before the act was passed giving such authority to such municipalities; but two answers are made to that objection, either of which is decisive.

1. By the act conferring that authority it is provided that where elections may have already been held, and a majority of the legal voters of the township were in favor of a subscription to said railroad, then and in that case no other election need be had, and the amount so voted for shall be subscribed as in the act is pro-

St. Joseph Township v. Rogers.

vided ; and the provision is that such elections are legal and valid, as if the act had been in force at the time thereof, and that all the provisions have been fulfilled. 2 *Priv. Laws* 1867, 762.

2. Because the legislature passed a subsequent act, declaring such subscriptions legal and obligatory. Some of the township officers, it seems, failed to keep a full and perfect record of elections called and held to authorize such subscriptions, and the clerks of the township failed, in some instances, to file the necessary certificate with the county clerk, as required by section 15 of the prior act. Omissions and defects of the kind becoming known, the legislature on February 25, 1869, enacted that, where such informalities and neglect may have occurred, and bonds have been issued, or may hereafter be issued, to aid in the construction of said railroad, that no such neglect or omission shall in any way invalidate or impair the collection of said bonds, principal or interest, as they may respectively fall due, and that all assessments that are now made for the payment of the principal or interest are hereby legalized, and the township collectors and county treasurers are hereby authorized and empowered to enforce the collection and payment of said tax, as is now provided by law for the collection of all other taxes.

Bonds to the amount of the subscription were accordingly issued, bearing date October 1, 1867, signed by the supervisor and countersigned by the clerk, and each bond contains the recital that it is issued under and by virtue of the aforesaid law of the state, entitled, "An act to amend the articles of association of the said railroad company, and to extend the powers of and confer a charter upon the same," and in accordance with the vote of the electors of said township at the special election held August 14, 1866, pursuant to said act, and pledges the faith of the township for the pay-

St. Joseph Township v. Rogers.

ment of the said principal sum and interest, as stipulated in the instrument.

Evidence was introduced by the defendants, showing that there is no record of the supposed election, when it is alleged that the question of the proposed subscription was submitted to the legal voters of the township, and that no such certificate as that required by the act conferring the authority to subscribe for the stock of the said company is on file in the office of the county clerk, but the plaintiff proved that the alleged meeting was notified, called, and held, and that sixty-two votes were given in favor of the subscription, and seventeen against it, as announced at the election.

Two instructions were given by the court to the jury, to which the defendants excepted: 1. That the election, held as described in the evidence, was validated by the act of February 28, 1867, so as to authorize the defendants to subscribe for the stock of the railroad company, and to issue the bonds in question, and that the bonds, having been issued for the stock subscribed, are binding on the defendants, in the hands of a *bona fide* holder. 2. That the recitals in the bonds estop the defendants from denying the fact of a valid election as against a *bona fide* holder of the bonds or coupons thereto annexed.

Under the instructions of the court the jury returned a verdict for the plaintiff, and the court rendered judgment on the verdict.

Repeated decisions of the state courts have established the rule that the legislature has the constitutional right to authorize municipal corporations to subscribe for the stock of a railroad company, and to issue their bonds to aid in the construction of such an intended improvement; that the supervisors of the municipality have the power, in case such a subscription is authorized, to subscribe for the stock of the railroad company, and to call an election to ascertain

St. Joseph Township v. Rogers.

the will of the legal voters in that behalf. *Pettyman v. Supervisors*, 19 *Ill.* 406; *Robertson v. Rockford*, 21 *Id.* 451; *Perkins v. Lewis*, 24 *Id.* 208; *Johnson v. Stark*, *Id.* 85; *Keithsburg v. Frick*, 34 *Id.* 405; *Commissioners v. Nichols*, 14 *Ohio St.* 260.

Such corporations are created by the legislature, and they derive all their powers from the source of their creation, and those powers are at all times subject to the control of the legislature.

Everywhere the construction and repair of highways within their limits are regarded as among the usual purposes of their creation, and the expenses of accomplishing those objects are among their usual and ordinary burdens. Railways, also, as matter of usage founded on experience, are so far considered by the courts as in the nature of improved highways and as indispensable to the public interest and the successful pursuit, even of local business, that the legislature may authorize the towns and counties of a state through which the railroad passes, to borrow money, issue their bonds, subscribe for the stock of the company, or purchase the same, to aid the railway company in constructing or completing such a public improvement. Legislation of the kind may be prohibited by a state constitution, but it is settled everywhere that such an act is not in contravention of any implied limitation of the power of a state to pass laws to promote the usual purposes of municipal corporations. *Rogers v. Burlington*, 3 *Wall.* 663; *Freeport v. Supervisors*, 41 *Ill.* 495; *Butler v. Dunham*, 27 *Id.* 474.

Argument to show that defective subscriptions of the kind may in all cases be ratified where the legislature could have originally conferred the power, is certainly unnecessary, as the question is authoritatively settled by the decisions of the supreme court of the state, and of this court, in repeated instances. *Cowgill v. Long*, 15 *Ill.* 203; *Keithsburg v. Frick*, 34 *Id.* 405;

St. Joseph Township v. Rogers.

Thompson v. Lee County, 3 *Wall.* 327; City v. Sampson, 9 *Id.* 477; Watson v. Mercer, 8 *Pet.* 111; Bissell v. Jeffersonville, 24 *How.* 295.

Suppose that is so, still it is insisted by the defendants that the election held to ascertain whether the legal voters of the township would authorize the subscription, was irregular and a nullity: 1. Because a majority of the legal voters of the township did not vote at the meeting notified and held for that purpose. 2. Because the meeting was notified and held before the act was passed providing for such an election.

Responsive to the first objection, it is insisted by the plaintiff that the legislature, in adopting the phrase "a majority of the legal voters of the township," intended to require only a majority of the legal voters of the township voting at the election notified, and held to ascertain whether the proposition to subscribe for the stock of the company should be adopted or rejected, and the court is of the opinion that such is the true meaning of the enactment, as the question would necessarily be determined by a count of ballots. *People v. Warfield*, 20 *Ill.* 163; *People v. Gaines*, 47 *Id.* 246; *People v. Weant*, 48 *Id.* 263; *Railroad v. Davidson County*, 1 *Sneed*, 692; *Ang. & Ames on Corp.* 9 ed. §§ 499, 500; *Bridgeport v. Railroad*, 15 *Conn.* 475; *Talbot v. Dent*, 9 *B. Monr. (Ky.)* 526; *State v. Mayor*, 37 *Mo.* 272.

Tested by these considerations, it is clear that an election was held within the meaning of the act of the legislature, and that a majority of the legal voters of the township did vote in favor of the subscription, as the proofs show that a meeting was called and held, and that the majority of the legal voters voting at the meeting voted in favor of the proposition.

Sufficient has already been remarked to show that the second objection cannot avail the defendants, as the same act provided to the effect that if the election had

St. Joseph Township v. Rogers.

already been held, and a majority of the legal voters had voted in favor of the subscription, no other election need be held, and that the amount so voted shall be subscribed, as provided in the same act. Mistakes and irregularities are of frequent occurrence in municipal elections, and the state legislatures have often had occasion to pass laws to obviate such difficulties. Such laws, when they do not impair any contract or injuriously affect the rights of third persons, are never regarded as objectionable, and certainly are within the competency of the legislative authority.

Even if the legislature may by a subsequent act validate and confirm previous acts of a municipal corporation otherwise invalid, still the defendants insist that a prior legislative act will not have any such effect, which cannot be admitted, as it would be competent for the legislature to authorize a municipal corporation to make such a subscription without requiring any such preliminary election.

Concede, however, that a prior act is insufficient to dispense with the preliminary election, still the concession cannot benefit the defendants, as it is clear that the subsequent act entirely obviates all the mistakes and irregularities in the prior proceedings, as it provides that where such informalities and neglect may have occurred, and bonds have been issued, or may hereafter be issued, to aid in the construction of said railroad, no such neglect or omission on the part of township officers shall in any way invalidate or impair the collection of said bonds, principal or interest, as they may respectively fall due. 3 *Priv. Laws* 1869, 274; *Thompson v. Lee County*, 8 *Wall.* 327; *Gelpcke v. Dubuque*, 1 *Id.* 220; *People v. Mitchell*, 35 *N. Y.* 551.

Authorities to support that proposition are hardly necessary; but another answer may be given to the objection quite as satisfactory as either of the others, which is, that section 14 of the act makes it the duty of

St. Joseph Township v. Rogers.

the supervisor who executed the bonds to determine the question whether an election was held, and whether a majority of the votes cast were in favor of the subscription; and inasmuch as he passed upon that question, and subscribed for the stock and subsequently executed and delivered the bonds, it is clearly too late to question their validity where it appears, as in this case, that they are in the hands of an innocent holder. *Priv. Laws* 1867, 762.

Knox County v. Aspinwall, 21 *How.* 544. Non-compliance with one of the conditions was clearly shown in that case, as the notices of the election as required by law had not been given in any form, but the decision was that the question as to the sufficiency of the notice and the ascertainment of the fact whether the majority of the votes had been cast in favor of the subscription was necessarily left to the inquiry and judgment of the county board, as no other tribunal was provided for the purpose, and the court held that after the authority had been executed, the bonds issued, and they had passed into the hands of innocent holders, it was too late, even in a direct proceeding, to call the power in question, and that it was beyond all doubt too late to call the power in question to the prejudice of a *bona fide* holder of the bonds in a collateral way, which is attempted to be done in the case before the court. *Supervisors v. Schenck*, 5 *Wall.* 783.

Exactly the same principles were applied in the case of *Royal British Bank v. Turquand*, 5 *Ell. & Bl.* 259, in which the opinion was given by the chief justice. He said the bond sued upon in the case is allowed to be under the seal of the company and to be their deed, consequently a *prima facie* case is made for the plaintiff, as the defendants, having executed the bond, have no defense under the plea of *non est factum*, and consequently the *onus* is cast upon them of showing that the bond is unlawful and void. No illegality appears

St. Joseph Township v. Rogers.

on the face of the bond or condition, which shows that the plea, in order that it may be supported, must allege facts to establish illegality, but the plea makes no charge of fraud against the plaintiff, and states no facts from which fraud may be inferred.

Want of authority to execute the bond, it was conceded, would be an answer to the action, but it was denied that a mere excess of authority by the directors would have that effect, unless it appeared that the plaintiff had knowledge of that fact, as the presumption would be, from what appeared on the face of the bond, that it was issued by lawful authority, and the court held that the plaintiff was entitled to recover, as he had advanced his money in good faith for the use of the company, giving credit to the representations of the directors that they had authority to execute the instrument.

Dissatisfied with the judgment the defendant brought a writ of error in the exchequer chamber, where the case was reargued, but the court of errors unanimously affirmed the judgment. S. C., 6 *Ell. & Bl.* 331.

Viewed in any reasonable light, the court is of the opinion that the plaintiff is an innocent holder for value, and that the loss, even if the supervisor failed in his duty to his constituents, cannot be cast upon the *bona fide* creditors of the township. *MacLae v. Sutherland*, 25 *Eng. Law & Eq.* 114.

BY THE COURT.—Judgment affirmed.

Olcott v. Supervisors of Fond du Lac County.

OLCOTT v. THE SUPERVISORS OF FOND DU
LAC COUNTY.

*Supreme Court of the United States; December
Term, 1872.*

Taxation by municipal corporations in aid of railroads. The question whether the interest of the public in the building of a railroad by a private corporation is of such a nature as to warrant taxation in aid of its construction, under the general power of the legislature to authorize taxation for the public interest, is not a question of constitutional construction, but of general law; and therefore the decision of a state court on such a question is not controlling in the supreme court of the United States.

A railway, although constructed and owned by a private corporation, is a public highway, in aid of the construction of which the power of the state to tax may properly be exerted. The ownership of the property is not a test as to whether the use of it is public or private.

That a legislative act empowering a county to raise money by taxation to aid in the construction of a railway, authorizes the county to make a donation to the railway company, instead of a subscription to its stock, is not an objection to the constitutionality of the act. The right to tax depends upon the use to which the tax is applied; not the manner of its application.

Where county orders issued to aid the construction of a railway were, when issued, valid under the constitution and laws of the state as previously expounded by its judicial tribunals, and understood at the time, no subsequent action of the legislature or the judiciary can be regarded by the courts as establishing the invalidity of such orders.

Error from the supreme court of the United States
to the circuit court for the eastern district of Wisconsin.

This was an action upon certain county orders or promissory notes, payable to bearer, issued by the defendants to a railroad company, to aid in the completion

Olcott v. Supervisors of Fond du Lac County.

of the road, under the authority stated in the opinion. The only question presented was as to the authority of the county to issue the orders, and the constitutional power of the legislature to authorize such issue. Judgment was rendered for the defendant; to review which the plaintiff prosecuted this writ of error.

STRONG, J.—The county orders, or promissory notes of the county, which are the foundation of this suit, were all issued February 18, 1869, and were made payable to the Sheboygan and Fond du Lac Railroad Company, or bearer. They were issued in pursuance of an act of assembly of the state, approved April 10, 1867, entitled “an act to authorize the county of Fond du Lac to aid the completion of the Sheboygan and Fond du Lac Railroad, and aid the building of a railroad from the city of Fond du Lac to the city of Ripon.” By that act the officers of the county were authorized to issue the orders to the railroad company, in case a popular vote, therein directed, should be in favor of railroad aid, and whether this act was a lawful exercise of constitutional power is the only question in the case. In the court below the jury was instructed, in substance, that the issue of the orders was unauthorized and void, and that the act of assembly above referred to was an unconstitutional exercise of legislative power. No other question was made at the trial, and no other is presented to us for our determination.

At the outset we are met by the fact that the supreme court of the state has decided the act was unauthorized by the constitution. It was thus ruled in *Whiting v. Fond du Lac County*, reported in 25 *Wis.* 188. If that decision is binding upon the federal courts, if it has established a rule which we are under obligations to follow, the matter is settled. It is undoubtedly true, in general, that this court does follow the decisions of the highest courts of the states respecting local ques-

Olcott v. Supervisors of Fond du Lac County.

tions peculiar to themselves, or respecting the construction of their own constitutions and laws. But it must be kept in mind that it is only decisions upon local questions, those which are peculiar to the several states, or adjudications upon the meaning of the constitution or statutes of a state, which the federal courts adopt as rules for their own judgments.

That *Whiting v. Fond du Lac County* was not a determination of any question of local law, is manifest. It is not claimed to have been that. But it is relied upon as having given a construction to the constitution of the state. Very plainly, however, such was not its character or effect. The question considered by the court was not one of interpretation or construction. The meaning of no provision of the state constitution was considered or declared. What was considered was the uses for which taxation generally, taxation by any government, might be authorized, and particularly whether the construction and maintenance of a railroad, owned by a corporation, is a matter of public concern. It was asserted (what nobody doubts) that the taxing power of a state extends no farther than to raise money for a public use, as distinguished from private, or to accomplish some end, public in its nature; and it was decided that building a railroad, if it be constructed and owned by a corporation, though built by authority of the state, is not a matter in which the public has any interest of such a nature as to warrant taxation in its aid. For this reason it was held that the state had no power to authorize the imposition of taxes to aid in the construction of such a railroad, and therefore that the statute giving Fond du Lac county power to extend such aid was invalid. This was a determination of no local question, or question of statutory or constitutional construction. It was not decided that the legislature had not general legislative power; or that it might not impose or authorize the imposition of taxes

Olcott v. Supervisors of Fond du Lac County.

for any public use. Now, whether a use is public or private is not a question of constitutional construction. It is a question of general law. It has as much reference to the constitution of any other state as it has to the state of Wisconsin. Its solution must be sought, not in the decisions of any single state tribunal, but in general principles common to all courts. The nature of taxation, what uses are public and what are private, and the extent of unrestricted legislative power, are matters which, like questions of commercial law, no state court can conclusively determine for us. This consideration alone satisfies our minds that *Whiting v. Fond du Lac county* furnishes no rule which should control our judgment, though the case is undoubtedly entitled to great respect.

There is another consideration that leads directly to the same conclusion. This court has always ruled that if a contract, when made, was valid under the constitution and laws of a state, as they had been previously expounded by its judicial tribunals, and as they were understood at the time, no subsequent action by the legislature or the judiciary will be regarded by this court as establishing its invalidity. *Havemeyer v. Iowa City*, 3 *Wall.* 294; *Gelpcke v. Dubuque*, 1 *Wall.* 175; *Ohio Life, &c. Co. v. Detroit*, 16 *How.* 432. Such a rule is based upon the highest principles of justice. Parties have a right to contract, and they do contract, in view of the law as declared to them when their engagements are formed. Nothing can justify us in holding them to any other rule. If, then, the doctrine asserted in *Whiting v. Fond du Lac County* is inconsistent with what was the recognized law of the state when the county orders were issued, we are under no obligation to accept it and apply it to this case. The orders were issued in February, 1869, and it was not until 1870 that the supreme court of the State decided that the uses for which taxation was authorized by the

Olcott v. Supervisors of Fond du Lac County.

statute of April 10, 1867, were not public uses, and therefore that the statute was invalid. Prior to 1870 it seems to have been as well settled in Wisconsin as elsewhere that the construction of a railway was a matter of public concern, and not the less so because done by a private corporation. That the state might authorize such an improvement, and exercise its right of eminent domain, therefore, was beyond question. Yet confessedly it could neither take property nor tax for such a purpose, unless the use for which the property was taken or the tax collected was a public one. And it was also the undoubted law of the State that building a railroad or a canal by any incorporated company was an act done for a public use, and thus the power of the legislature to delegate to such a company the state right of eminent domain was justified. In *Pratt v. Bowen*, 3 *Wis.* 612, it was said by the supreme court of the state that the incorporation of companies for the purpose of constructing railroads or canals, affords the best illustration of the delegation of power to exercise the right of eminent domain, by the condemnation and seizure of private property for public use upon making just compensation therefor. It is admitted that the only principle upon which such delegation of power can be justified is that the property taken by these companies is taken for the public use. Similar language was used and a decision to the same effect was made in *Robins v. Railroad Co.*, 6 *Wis.* 641. In *Hasbrook v. Milwaukee*, 13 *Id.* 13, a case where the right to tax for the improvement of a harbor was under consideration, the court used this significant language :

“The power of municipal corporations, when authorized by the legislature, to engage in works of internal improvement, such as the building of railroads, canals, harbors, and the like, or to loan their credit in aid thereof, and to defray the expenses of such improve-

Olcott v. Supervisors of Fond du Lac County.

ments, make good their pledges by an exercise of the power of taxing the persons and property of their citizens, has always been sustained on the ground that such works, although they are in general operated and controlled by private corporations, are nevertheless, by reason of the facilities which they afford for trade, commerce, and intercommunication between different and distant portions of the country, indispensable to the public interests and public functions. It was originally supposed that they would add, and subsequent experience demonstrated that they have added vastly, and almost immeasurably, to the general business, the commercial prosperity, and the pecuniary resources of the inhabitants of cities, towns, villages, and rural districts through which they pass, and with which they are connected. It is in view of these results, the public good thus produced, and the benefits thus conferred upon the persons and property of all the individuals composing the community, that courts have been able to pronounce them matters of public concern, for the accomplishment of which the taxing power might lawfully be called into action. It is in this sense that they are said to fall so far within the purposes for which municipal corporations are created that such corporations may engage in, or pledge their credit for their construction."

So also in *Soens v. Racine*, 10 *Wis.* 280, where the validity of a law authorizing a local tax to secure the lake shore was in question, the court discussed at length the nature of a public use for which taxation was lawful, and ruled that the use was a public one though only the property of some inhabitants of the city was saved, remarking that to determine whether a matter is a public or merely a private concern we have not to determine whether or not the interests of some individuals will be directly promoted, but whether those of the whole or the greater part of the community

Olcott v. Supervisors of Fond du Lac County.

will be. And again, in *Brodhead v. Milwaukee*, 19 *Wis.* 652, the court said :

“The legislature cannot create a public debt, or levy a tax, or authorize a municipal corporation to do so, in order to raise funds for a mere private purpose. It cannot, in the form of a tax, take the money of a citizen and give it to an individual, the public interest or welfare being in no way connected with the transaction. The objects for which the money is raised by taxation must be public, and such as subserve the common interest and well-being of the community required to contribute.”

“To justify the court in arresting the proceedings and declaring the tax void, the absence of all possible public interest in the purpose for which the funds are raised must be clear and palpable ; so clear and palpable as to be perceptible by every mind at the first blush.”

See also *Clark v. Janesville*, 10 *Wis.* 136, and *Bushnell v. Beloit*, *Id.* 195.

All these expositions of the law of the State were made by the highest court before the county orders now in suit were issued. They certainly did assert that building a railroad, whether built by the State or by a corporation created by the State for that purpose, was a matter of public concern, and that, because it was a public use, the right of eminent domain might be exerted or delegated for it, and taxation might be authorized for its aid. It was the declared law of the State, therefore, when the bonds now in suit were issued, that the uses of railroads, though built by private corporations, were public uses, such as warranted the exercise of the public right of eminent domain in their aid, and also the power of taxation. We are not, then, concluded by a decision, made in 1870, that such public uses are not of a nature to justify the imposition of taxes. We are at liberty to inquire

Olcott v. Supervisors of Fond du Lac County.

what are public uses, and what restrictions, if any, are imposed upon the state's taxing power.

It is not claimed that the constitution of Wisconsin contains any *express* denial of power in the legislature to authorize municipal corporations to aid in the construction of railroads, or to impose taxes for that purpose. The entire legislative power of the State is confessedly vested in the general assembly. An implied inhibition only is asserted. It is insisted that as the state cannot itself impose taxes for any other than a public use, so the legislature cannot empower a municipal division of the state to levy and collect taxes for any other than such a use, and it is denied that taxation to enable the county of Fond du Lac to aid in the completion of the Sheboygan and Fond du Lac railroad is taxation for a public use. No one contends that the power of a state to tax, or to authorize taxation, is not limited by the uses to which the proceeds may be devoted. Undoubtedly, taxes may not be laid for a private use. But is the construction of a railroad by a company incorporated by a state for the purpose of building it, and endowed with the state's right of eminent domain, a thing in which the state has, as such, no interest? That the legislature of Wisconsin may alter or repeal the charter granted to the Sheboygan and Fond du Lac Railroad Company is certain. This is a power reserved by the constitution. The railroad can, therefore, be controlled and regulated by the state. Its use can be defined; its tolls and rates for transportation may be limited. Is a work made by authority of the state, subject thus to its regulation, and having for its object an increase of public convenience, to be regarded as ordinary private property?

That railroads, though constructed by private corporations and owned by them, are public highways, has been the doctrine of nearly all the courts ever since such conveniences for passage and transportation have

Olcott v. Supervisors of Fond du Lac County.

had any existence. Very early the question arose whether a state's right of eminent domain could be exercised by a private corporation created for the purpose of constructing a railroad. Clearly it could not, unless taking land for such a purpose by such an agency is taking land for public use. The right of eminent domain nowhere justifies taking property for a private use. Yet it is a doctrine universally accepted that a state legislature may authorize a private corporation to take land for the construction of such a road, making compensation to the owner. What else does this doctrine mean if not that building a railroad, though it be built by a private corporation, is an act done for a public use? And the reason why the use has always been held a public one, is that such a road is a highway, whether made by the government itself or by the agency of corporate bodies, or even individuals when they obtain their power to construct it from legislative grant. It would be useless to cite the numerous decisions to this effect which have been made in the State courts. We may, however, refer to two or three which exhibit fully not only the doctrine itself, but the reasons upon which it rests: *Beekman v. Saratoga, &c. R. R. Co.*, 3 *Paige* (N. Y.), 45; *Blodgett v. Mohawk, &c. R. R. Co.*, 18 *Wend.* (N. Y.) 1; *Worcester v. Railroad Co.*, *Metc.* (Mass.) 556.

Whether the use of a railroad is a public or a private one depends in no measure upon the question who constructed it or owns it. It has never been considered a matter of any importance that the road was built by the agency of a private corporation. No matter who is the agent, the function performed is that of the state. Though the ownership is private, the use is public. So turnpikes, bridges, ferries, and canals, although made by individuals under public grants, or by companies, are regarded as *publici juris*. The right to exact tolls or charge freights is granted for a service to the public.

Olcott v. Supervisors of Fond du Lac County.

The owners may be private companies, but they are compellable to permit the public to use their works in the manner in which such works can be used. *Charles River Bridge Company v. Warren*, 7 *Pick. (Mass.)* 495. That all persons may not put their own cars upon the road, and use their own motive power, has no bearing upon the question whether the road is a public highway. It bears only upon the mode of use, of which the legislature is the exclusive judge. *Cooley's Const. Lim.*

It is unnecessary, however, to push this branch of the inquiry further, for it is not seriously denied that a railroad, though constructed and owned by a private corporation, is a matter of public concern, and that its uses are so far public that the right of eminent domain of the state may be exerted to facilitate its construction. But it is contended that though the purpose and the use may be public, sufficiently to justify taking private property, they are not public when the right to impose taxes is asserted. It is argued that there are differences between the power of taxation and the power of taking private property for public use, and that because of these differences it does not follow that wherever the one power may be exerted the other can. We do not care to inquire whether this is so or not. The question now is whether, if a railroad, built and owned by a private corporation, is for a public use, because it is a highway, taxes may not be imposed in furtherance of that use. If there be any purpose for which taxation would seem to be legitimate, it is the making and maintenance of highways. They have always been governmental affairs, and it has ever been recognized as one of the most important duties of the state to provide and care for them. Taxation for such uses has been immemorially imposed. When, therefore, it is settled that a railroad is a highway for public use, there can be no substantial reason why the power of the state to

Olcott v. Supervisors of Fond du Lac County.

tax may not be exerted in its behalf. It is said that railroads are not public highways *per se*; that they are only declared such by the decisions of the courts, and that they have been declared public only with respect to the power of eminent domain. This is a mistake. In their very nature they are public highways. It needed no decision of courts to make them such. True, they must be used in a peculiar manner, and under certain restrictions, but they are facilities for passage and transportation, afforded to the public, of which the public has a right to avail itself. As well might it be said a turnpike is a highway, only because declared such by judicial decision. A railroad built by a state, no one claims would be anything else than a public highway, justifying taxation for its construction and maintenance, though it could be no more open to public use than is a road built and owned by a corporation. Yet it is the purpose and the uses of a work which determine its character. And if the purpose is one for which the state may properly levy a tax upon its citizens at large, its legislature has the power to apportion and impose the duty, or confer the power of assuming it upon the municipal divisions of the state. *Cooley's Const. Lim.* 226. And surely it cannot be maintained that ownership by the public, or by the state, of the thing in behalf of which the tax is imposed, is necessary to justify the imposition. There are many acknowledged public uses that have no relation to ownership. Indeed, most public expenditures are for purposes apart from any proprietorship of the state. A public use may, indeed, consist in the possession, occupation, and enjoyment of property by the public, or agents of the public, but it is not necessarily so. Even in regard to common roads, generally, the public has no ownership of the soil, no right of possession or occupation. It has a mere right of passage. While, then, it may be true that ownership of property may

Olcott v. Supervisors of Fond du Lac County.

sometimes bear upon the question whether the uses of the property are public, it is not the test.

The argument most earnestly urged against the constitutionality of the act, is that it attempted to authorize Fond du Lac county to assist the railroad company by a donation. It is stoutly contended that the legislature could not authorize the county to impose taxes to enable it to make a donation in aid of the construction of the railroad, even if its ultimate uses are public. But why not? If the county can be empowered to aid the work because it is a public use, what difference can it make in what mode the aid be extended? It is conceded that in Wisconsin municipal corporations may be authorized to become subscribers to the stock of private railroad companies, and to raise money by taxation to meet bonds given in payment of the subscriptions. This has been decided by the highest court of the state. *Clark v. Janesville*, 10 *Wis.* 136; *Bushnell v. Beloit*, *Id.* 195. And the reasons given for the decision are, not that the municipal bodies acquired property rights by their subscriptions, or that they thereby obtained partial control of the railroad companies, but that subscriptions to the stock were a mode of aiding a work in which the public had an interest, a work of such a nature that it might properly be aided by taxation. Never was the right to tax supposed to rest in any degree upon anything else. Whether the stock had value or not was not even considered. Equally with the taxation the municipal subscription could be justified only because it was for a public use. If taxation is invalid because laid for a private use the nature of the use cannot be changed by receiving stock for the money raised. There is no substantial difference in principle between aid given to a railroad company by subscriptions to its stock and aid given by donations of money or land. The burden upon the county may be the same in whichever mode the aid is given, and the

Philadelphia, &c. R. R. Co. v. Pennsylvania.

uses promoted are precisely the same. And the courts have never attempted to make any distinction in the cases ; certainly not until the case of *Whiting v. Fond du Lac*, and even then no real difference is shown. On the other hand, the power to tax for the purpose of making donations in aid of railroads built by private corporations has been affirmed. *Gibbons v. Mobile, &c. R. R. Co.*, 36 *Ala.* 410 ; *Davidson v. Ramsey County, Minn.* We have, however, considered this subject in the case of the *Chicago, Burlington, and Quincy R. R. Co. v. County of Otoe*, and nothing more need be said. What we have already remarked is sufficient to show that in our opinion the act of the legislature of Wisconsin, approved April 10, 1867, was a constitutional exercise of legislative power, and consequently that the circuit court erred in instructing the jury that it was unconstitutional and void, and in directing a verdict for the defendants.

BY THE COURT.—The judgment is reversed, and the record is remitted, with instructions to award a *venire de novo*.

THE PHILADELPHIA & READING RAILROAD
COMPANY v. PENNSYLVANIA.

*Supreme Court of the United States ; December Term,
1872.*

Taxation of railway companies for goods transported. A state statute imposing a tax upon railway and other corporations according to the amount of goods carried by them, of which the substantial burden rests, not upon the franchise or property of such companies, but

Philadelphia, &c. R. R. Co. v. Pennsylvania.

upon the freight transported by them, is repugnant to the provision of the constitution of the United States, giving Congress power to regulate commerce, so far as it applies to goods other than those taken up and delivered within the state.

Error from the supreme court of the United States to the supreme court of Pennsylvania.

The only question presented by this case was the validity of an act of the legislature of Pennsylvania, imposing a tax upon certain carrying companies, according to the freight carried by each. The decision of the supreme court of the state was in favor of the validity of the statute.

R. A. Lamberton, John W. Simonton, James E. Gowen, and W. W. McFarland, for the plaintiff in error.

J. W. M. Newlin, Lewis Waln Smith, F. Carroll Brewster, and Wayne MacVeagh, for the defendant in error

STRONG, J.—This is a writ of error to the supreme court of Pennsylvania, and we are called upon to review a judgment of that court affirming the validity of a statute of the state, which the plaintiffs in error allege to be repugnant to the federal constitution.

The statute was enacted August 25, 1864, and was entitled "An act to provide additional revenues for the use of the commonwealth." Its first section enacted "that the president, treasurer, cashier, or other financial officer of every railroad company, steamboat company, canal company, and slackwater navigation company, and all other companies now or hereafter doing business within this state, and upon whose works freight may be transported, whether by such company or by individuals, and whether such company shall receive compensation for transportation, for transportation and toll,

Philadelphia, &c. R. R. Co. v. Pennsylvania.

or shall receive tolls only, except turnpike companies, plank road companies, and bridge companies, shall, within thirty days after the first days of January, April, July, and October of every year, make return in writing to the auditor general, under oath or affirmation, stating fully and particularly the number of tons of freight carried over, through, or upon the works of said company, for the three months immediately preceding each of the above mentioned days; and each of said companies, except as aforesaid, shall, at the time of making such return, pay to the state treasurer, for the use of the commonwealth, on each two thousand pounds of freight so carried, tax at the following rates: First, on the product of mines" (and other articles), "two cents;" "second," on another class of articles, three cents, and on a third class five cents. The section further enacted that "when the same freight shall be carried over different but continuous lines, said freight shall be chargeable with tax, as if it had been carried but upon one line, and the whole tax shall be paid by such one of said companies as the state treasurer may select and notify thereof; corporations whose lines of improvements are used by others for the transportation of freight, and whose only earnings arise from tolls received for such use, are authorized to add the tax hereby imposed to said tolls, and collect the same therewith, but in no case shall tax be twice charged on the same freight carried on or over the same line of improvements. Provided that every company now or hereafter incorporated by this commonwealth, whose line extends into any other state, and every corporation, company, or individual of any other state holding and enjoying any franchises, property, or privileges whatever in this state, by virtue of the laws thereof, shall make returns of freight, and pay for the freight carried over, through, and upon that portion of their lines within this state, as

Philadelphia, &c. R. R. Co. v. Pennsylvania.

if the whole of their respective lines were within this state."

It is the validity of this statute which is now assailed, and the case we have before us presents the question whether, so far as it imposes a tax upon freight taken up within the state and carried out of it, or taken up outside the state and delivered within it, or, in different words, upon all freight other than that taken up and delivered within the state, it is not repugnant to the provision of the constitution of the United States, which ordains "that Congress shall have power to regulate commerce with foreign nations and among the several states," or in conflict with the provision that "no state shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

The question is a grave one. It calls upon us to trace the line, always difficult to be traced, between the limits of state sovereignty in imposing taxation and the power and duty of the federal government to protect and regulate inter-state commerce. While upon the one hand it is of the utmost importance that the states should possess the power to raise revenue for all the purposes of a state government, by any means and in any manner not inconsistent with the powers which the people of the states have conferred upon the general government, it is equally important that the domain of the latter should be preserved free from invasion, and that no state legislation should be sustained which defeats the avowed purposes of the federal constitution, or which assumes to regulate or control subjects committed by that constitution exclusively to the regulation of Congress.

Before proceeding, however, to a consideration of the direct question whether the statute is in direct conflict with any provision of the constitution of the United States, it is necessary to have a clear apprehension of

Philadelphia, &c. R. R. Co. v. Pennsylvania.

the subject and the nature of the tax imposed by it. It has repeatedly been held that the constitutionality or unconstitutionality of a state tax is to be determined, not by the form or agency through which it is to be collected, but by the subject upon which the burden is laid. This was decided in the cases of *Bank of Commerce v. New York City*, 2 *Black*, 620; in the *Bank Tax Case*, 2 *Wall*, 200; *Society for Savings v. O'rite*, 6 *Id.* 594; and *Provident Bank v. Massachusetts*, 6 *Id.* 611. In all these cases it appeared that the bank was required by the statute to pay the tax, but the decisions turned upon the question, what was the subject of the tax, upon what did the burden really rest, not upon the question from whom the state exacted payment into its treasury. Hence, where it appeared that the ultimate burden rested upon the property of the bank invested in United States securities, it was held unconstitutional, but where it rested upon the franchise of the bank, it was sustained.

Upon what, then, is the tax imposed by the act of August 25, 1864, to be considered as laid? Where does the substantial burden rest? Very plainly it was not intended to be, nor is it in fact, a tax upon the franchise of the carrying companies, or upon their property, or upon their business measured by the number of tons of freight carried. On the contrary, it is expressly laid upon the freight carried. The companies are required to pay to the state treasurer for the use of the commonwealth, "on each two thousand pounds of freight so carried," a tax at the specific rates. And this tax is not proportioned to the business done in transportation. It is the same whether the freight be moved one mile or three hundred. If freight be put upon a road and carried at all, tax is to be paid upon it, the amount of the tax being determined by the character of the freight. And when it is observed that the act provides "where the same freight

Philadelphia, &c. R. R. Co. v. Pennsylvania.

shall be carried over and upon different but continuous lines, said freight shall be chargeable with tax as if it had been carried upon one line, and the whole tax shall be paid by such one of said companies as the state treasurer may select and notify thereof," no room is left for doubt. This provision demonstrates that the tax has no reference to the business of the companies. In the case of connected lines thousands of tons may be carried over the lines of one company without any liability of that company to pay the tax. The state treasurer is to decide which of several shall pay the whole. There is still another provision in the act which shows that the burden of the tax was not intended to be imposed upon the companies designated by it, neither upon their franchises, their property, nor their business. The provision is as follows: "Corporations whose lines of improvements are used by others for the transportation of freight, and whose only earnings arise from tolls charged for such use, are authorized to add the tax hereby imposed to said tolls, and to collect the same herewith." Evidently this contemplates a liability for the tax beyond that of the company required to pay it into the treasury, and it authorizes the burden to be laid upon the freight carried, in exemption of the corporation owning the roadway. It carries the tax over and beyond the carrier to the thing carried. Improvement companies, not themselves authorized to act as carriers, but having only power to construct and maintain roadways, charging tolls for the use thereof, are generally limited by their charters in the rates of toll they are allowed to charge. Hence the right to increase the tolls to the extent of the tax was given them in order that the tax might come from the freight transported, and not from the treasury of the companies. It required no such grant to companies which not only own their roadway, but have the right to transport thereon. Though the tolls they may exact are limited,

Philadelphia, &c. R. R. Co. v. Pennsylvania.

their charges for carriage are not. They can, therefore, add the tax to the charge for transportation without further authority. *Boyle v. Reading R. R. Co.*, 54 *Pa. St.* 310; *Cumberland Valley R. R. Co.'s Appeal*, 62 *Id.* 218. In view of these provisions of the statute, it is impossible to escape from the conviction that the burden of the tax rests upon the freight transported, or upon the consignor or consignee of the freight (imposed because the freight is transported,) and that the company authorized to collect the tax and required to pay it into the state treasury is, in effect, only a tax gatherer. The practical operation of the law has been well illustrated by another when commenting upon a statute of the state of Delaware, very similar to the one now under consideration. He said, "the position of the carrier under this law is substantially that of one to whom public taxes are farmed out—who undertakes by contract to advance to the government a required revenue, with power by suit or distress to collect a like amount out of those upon whom the tax is laid. The only imaginable difference is, that, in the case of taxes farmed out, the obligation to account to the government is voluntarily assumed by contract, and not imposed by laws, as upon the carrier under this act; also, that different means are provided for raising the tax out of those ultimately chargeable with it." *BATES, C.*, in *Clark v. Philadelphia, &c. R. R. Co.*

Considering it, then, as manifest that the tax demanded by the act is imposed, not upon the company, but upon the freight carried, and because carried, we proceed to inquire whether, so far as it affects commodities transported through the State, or from points without the State to points within it, or from points within the State to points without it, the act is a regulation of inter-state commerce. Beyond all question the transportation of freight, or of the subjects of commerce for the purpose of exchange or sale, is a con-

Philadelphia, &c. R. R. Co. v. Pennsylvania.

stituent of commerce itself. This has never been doubted, and probably the transportation of articles of trade from one state to another was the prominent idea in the minds of the framers of the constitution, when to congress was committed the power to regulate commerce among the several states. A power to prevent embarrassing restrictions by any state was the thing desired. The power was given by the same words and in the same clause by which was conferred power to regulate commerce with foreign nations. It would be absurd to suppose that the transmission of the subjects of trade from the state to the buyer, or from the place of production to the market, was not contemplated, for without that there could be no consummated trade either with foreign nations or among the states. In his work on the constitution, section 1057, Judge STORY asserts that the sense in which the word commerce is used in that instrument, includes not only traffic, but intercourse and navigation. And in the *Passenger Cases*, 7 *How. U. S.* 416, it was said: "Commerce consists in selling the superfluity, in purchasing articles of necessity, as well productions as manufactures, in buying from one nation and selling to another, or in transporting the merchandise from the seller to the buyer to gain the freight." Nor does it make any difference whether this interchange of commodities is by land or by water. In either case the bringing of the goods from the seller to the buyer is commerce. Among the states it must have been principally by land when the constitution was adopted.

Then, why is not a tax upon freight transported from state to state a regulation of inter-state transportation, and, therefore a regulation of commerce among the states? Is it not prescribing a rule for the transporter, by which he is to be controlled in bringing the subjects of commerce into the state, and in taking them out? The present case is the best possible illus-

Philadelphia, &c. R. R. Co. v. Pennsylvania.

tration. The legislature of Pennsylvania has in effect declared that every ton of freight taken up within the state and carried out, or taken up in other states and brought within her limits, shall pay a specified tax. The payment of that tax is a condition, upon which is made dependent the prosecution of this branch of commerce. And as there is no limit to the rate of taxation she may impose, if she can tax at all, it is obvious the condition may be made so onerous that an interchange of commodities with other States would be rendered impossible. The same power that may impose a tax of two cents per ton upon coal carried out of the state, may impose one of five dollars. Such an imposition, whether large or small, is a restraint of the privilege or right to have the subjects of commerce pass freely from one state to another without being obstructed by the intervention of state lines. It would hardly be maintained, we think, that had the state established custom houses on her borders, wherever a railroad or canal comes to the state line, and demanded at these houses a duty for allowing merchandise to enter or to leave the state upon one of those railroads or canals, such an imposition would not have been a regulation of commerce with her sister states. Yet it is difficult to see any substantial difference between the supposed case and the one we have in hand. The goods of no citizen of New York, New Jersey, Ohio, or of any other state, may be placed upon a canal, railroad, or steamboat within the state for transportation any distance, either into or out of the State, without being subject to the burden. Nor can it make any difference that the legislative purpose was to raise money for the support of the state government, and not to regulate transportation. It is not the purpose of the law, but its effect, which we now are considering. Nor is it at all material that the tax is levied upon all freight, as well that which is wholly internal as that embarked in inter-state trade.

Philadelphia, &c. R. R. Co. v. Pennsylvania.

We are not at this moment inquiring further than whether taxing goods carried because they are carried is a regulation of carriage. The state may tax its internal commerce, but if an act to tax inter-state or foreign commerce is unconstitutional, it is not cured by including in its provisions subjects within the domain of the state. Nor is a rule prescribed for carriage of goods through, out of, or into a State any the less a regulation of transportation, because the same rule may be applied to carriage which is wholly internal. Doubtless a state may regulate its internal commerce as it pleases. If a state chooses to exact conditions for allowing the passage or carriage of persons or freight through it into another state, the nature of the exaction is not changed by adding to it similar conditions for allowing transportation wholly within the state.

We may notice here a position taken by the defendants in error, and stoutly defended in the argument, that the tax levied, instead of being a regulation of commerce, is compensation for the use of the works of internal improvement constructed under the authority of the state and by virtue of franchises granted by the state; in other words, that it is a toll for the use of the highways, a part of which, in right of her eminent domain, the state may order to be paid into her treasury. We are asked, if the works were in her own hands, if she were the owner of them, what provision in the federal constitution would forbid her to increase her revenue by an increase of the charge of transportation over them? When in the hands of creatures exercising her franchises, which clause in any instrument forbids her to tax the franchises, and to authorize the tax to be added to existing tolls and franchises?

That this argument rests upon a misconception of the statute is, to our minds, very evident. We concede the right and power of the state to tax the franchises

of its corporations, and the right of the owners of artificial highways, whether such owners be the state or grantees of franchises from the state, to exact what they please for the use of their ways. That right is an attribute of ownership. But this tax is not laid upon the franchises of the corporation, nor upon those who hold a part of the state's eminent domain. It is laid upon those who deal with the owners of the highways or means of conveyance. The state is not herself the owner of the roadways, nor of the motive power. The tax is not compensation for services rendered by her or by her agents. It is something beyond the cost of transportation or the ordinary charges therefor. Having no ownership in the railroads or canals, the state has no title to their income, except so far as she reserves it in the charters of the companies. Tolls and freights are a compensation for services rendered, or facilities furnished to a passenger or transporter. These are not rendered or furnished by the state. A tax is a demand of sovereignty; a toll is a demand of proprietorship. The tax levied by this act is therefore not a toll. It is not exacted in compensation for the use of the roadway; and if it were, the right to make terms for the use of the roadway is in the grantee of the franchises, not in the grantor. But, in truth, the state has no more right to demand a portion of the tolls which the grantees of her franchises may exact, than she would have to demand a portion of the rents of land which she has sold. She may tax by virtue of her sovereignty, and measure the tax by income, but the income itself is beyond her reach. All this, however, is abstract and apart from the case before us. That the act of 1864 was not intended to assert a claim for the use of the public works, or a claim for a part of the tolls, is too apparent to escape observation. The tax was imposed upon freight carried by steamboat companies, whether incorporated by the state or not, and

Philadelphia, &c. R. R. Co. v. Pennsylvania.

whether exercising privileges granted by the state or not. It reaches freight passing up and down the Delaware and Ohio rivers, carried by companies who derive no rights from grants of Pennsylvania, who are exercising no part of her eminent domain; and, as we have noticed heretofore, the tax is not proportioned to services rendered, or to the use made of canals or railways. It is the same whether the transportation be long or short. It must, therefore, be considered an exaction, in right of alleged sovereignty, from freight transported, or the right of transportation out of or into or through the state—a burden upon inter-state intercourse.

If, then, this is a tax upon freight carried between states, and a tax because of its transportation, and if such a tax is in effect a regulation of inter-state commerce, the conclusion seems to be inevitable, that it is in conflict with the constitution of the United States. It is not necessary to the present case to go at large into the much debated question whether the power given to Congress by the constitution to regulate commerce among the states is exclusive. In the earlier decisions of this court, it was said to have been so entirely vested in Congress that no part of it can be exercised by a state. *Gibbons v. Ogden*, 9 *Wheat.* 1; *Passenger Cases*, 7 *How.* 283. It has, indeed, often been argued, and sometimes intimated by the court, that so far as Congress has not legislated on the subject, the states may legislate respecting inter-state commerce. Yet, if they can, why may they not add regulations to commerce with foreign nations beyond those made by Congress, if not inconsistent with them, for the power over both foreign and inter-state commerce is conferred upon the Federal legislature by the same words. And certainly it has never yet been decided by this court that the power to regulate inter-state, as well as foreign commerce, is not exclusively in Congress. Cases that have sustained

Philadelphia, &c. R. R. Co. v. Pennsylvania.

state laws alleged to be regulations of commerce among the states have been such as related to bridges or dams across streams wholly within a state, police or health laws, or subjects of a kindred nature, not strictly commercial regulations. The subjects were such as in *Gilman v. Philadelphia*, 3 *Wall.* 713, it was said "can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively." However this may be, the rule has been asserted with great clearness, that whenever the subjects over which the power to regulate commerce is asserted are in their nature national, or admit of one uniform system or plan of regulation, they may justly be said to be of such a nature as to require exclusive legislation by Congress. *Cooley v. Port Wardens*, 12 *How.* 299; *Gilman v. Philadelphia*, *supra*; *Crandall v. Nevada*, 6 *Wall.* 42. Surely transportation of passengers or merchandise through a state, or from one state to another, is of this nature. It is of national importance that over that subject there should be but one regulating power; for if one state can directly tax persons or property passing through it, or tax them indirectly by levying a tax upon their transportation, every other may, and thus commercial intercourse between states remote from each other may be destroyed. The produce of western states may thus be effectually excluded from eastern markets; for, though it might bear the imposition of a single tax, it would be crushed under the load of many. It was to guard against the possibility of such commercial embarrassments, no doubt, that the power of regulating commerce among the states was conferred upon the federal government.

In *Almy v. California*, 24 *How.* 169, it was held by this court that a law of this state imposing a tax upon bills of lading for gold or silver transported from that state to any port or place without the state, was sub-

Philadelphia, &c. R. R. Co. v. Pennsylvania.

stantially a tax upon the transportation itself, and was therefore unconstitutional. True, the decision was rested on the ground that it was a tax upon exports; and subsequently, in *Woodruff v. Parham*, 8 *Wall.* 123, the court denied the correctness of the reasons given for the decision, but they said at the same time the case was well decided for another reason, viz.: that such a tax was a regulation of commerce—a tax imposed upon the transportation of goods from one state to another over the high seas, in conflict with that freedom of transit of goods and persons between one state and another, which is within the rule laid down in *Crandall v. Nevada*, 6 *Wall.* 35, and with the authority of Congress to regulate commerce among the states.

In *Crandall v. State of Nevada*, where it appeared that the legislature of the state had enacted that there should "be levied and collected a capitation tax of one dollar upon every person leaving the state by any railroad, stage-coach, or other vehicle engaged or employed in the business of transporting passengers for hire," and required the proprietors, owners, and corporations so engaged to make monthly reports of the number of persons carried, and to pay the tax, it was ruled that, though required to be paid by the carriers, the tax was a tax upon passengers for the privilege of being carried out of the state, and not a tax upon the business of the carriers. For that reason, it was held that the law imposing it was invalid, as in conflict with the constitution of the United States. A majority of the court, it is true, declined to rest the decision upon the ground that the tax was a regulation of inter-state commerce, and therefore beyond the power of the state to impose, but all the judges agreed that the state law was unconstitutional and void. The Chief Justice and Mr. Justice CLIFFORD thought the judgment should have been placed exclusively on the ground that the act of the state legislature was inconsistent with the power con-

Philadelphia, &c. R. R. Co. v. Pennsylvania.

ferred upon Congress to regulate commerce among the several states, and it does not appear that the other judges held that it was not thus inconsistent. In any view of the case, however, it decides that a state cannot tax persons for passing through or out of it. Interstate transportation of passengers is beyond the reach of a state legislature. And if state taxation of persons passing from one state to another, or a state tax upon inter-state transportation of passengers is unconstitutional, *a fortiori*, if possible, is a state tax upon the carriage of merchandise from state to state, in conflict with the Federal constitution. Merchandise is the subject of commerce. Transportation is essential to commerce; and every burden laid upon it is *pro tanto* a restriction. Whatever, therefore, may be the true doctrine respecting the exclusiveness of the power vested in Congress to regulate commerce among the states, we regard it as established that no state can impose a tax upon freight transported from state to state, or upon the transporter, because of such transportation.

But while holding this, we recognize fully the power of each state to tax at its discretion its own internal commerce, and the franchises, property, or business of its own corporations, so that inter-state intercourse, trade, or commerce be not embarrassed or restricted. That must remain free.

The conclusion of the whole is that, in our opinion, the act of the legislature of Pennsylvania of August 25, 1864, so far as it applies to articles carried through the state, or articles taken up in the state and carried out of it, or articles taken up without the state and brought into it, is unconstitutional and void.

SWAYNE and DAVIS, JJ., dissented.

SWAYNE, J.—I dissent from the opinion just read. In my judgment, the tax is imposed upon *the business*

Philadelphia, &c. R. R. Co. v. Pennsylvania.

of those required to pay it. The tonnage is only the mode of ascertaining the extent of the business. That no discrimination is made between freight carried wholly within the state and that brought into or carried through or out of it, sets this, as I think, in a clear light, and is conclusive on the subject.

I am authorized to say that Mr. Justice DAVIS unites with me in this dissent.

BY THE COURT.—Judgment reversed, and cause remanded for further proceedings, in accordance with the opinion delivered by STRONG, J.

**THE PHILADELPHIA & READING RAILROAD
COMPANY v. PENNSYLVANIA.**

*Supreme Court of the United States; December Term,
1872.*

Taxation of railway companies according to gross receipts. A state statute, imposing a tax upon railway and other corporations according to their gross receipts, is not repugnant to the provision of the constitution of the United States giving Congress power to regulate commerce. The substantial burden of such law rests, not upon commerce, but upon the property and franchises of the companies; the value of which may properly be measured by their gross receipts.

Error from the supreme court of the United States to the supreme court of Pennsylvania.

As in the case immediately preceding, the decision of the state court was in favor of the validity of the statute imposing the tax.

Philadelphia, &c. R. R. Co. v. Pennsylvania.

STRONG, J.—By an act of the legislature of Pennsylvania, passed on February 23, 1866, entitled "An act to amend the revenue laws of the commonwealth," a tax was imposed upon the gross receipts of certain companies. The second section is as follows: "In addition to the taxes now provided by law, every railroad, canal, and transportation company incorporated under the laws of this commonwealth, and not liable to the tax upon income under existing laws, shall pay to the commonwealth a tax of three-fourths of one per centum upon the gross receipts of said company; the said tax shall be paid semi-annually upon the first days of July and January, commencing on July 1, 1866; and for the purpose of ascertaining the amount of the same, it shall be the duty of the treasurer, or other proper officer of said company, to transmit to the auditor general a statement, under oath or affirmation, of the amount of gross receipts of the said company during the preceding six months; and if such company shall refuse, or fail, for a period of thirty days after such tax becomes due, to make said return, or to pay the same, the amount thereof, with an addition of ten per centum thereto, shall be collected for the use of the commonwealth, as other taxes are recoverable by law from said companies."

Under this act a tax was levied upon the plaintiffs in error of three-quarters of one per cent. of the gross receipts of the company during the six months ending December 31, 1867, and the question now is whether the act imposing it is in conflict with the third clause of section 8, article 1, of the constitution of the United States, which confers upon Congress power to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes;" or whether it is conflict with the second clause of section 10 of the same article, which prohibits the states, without the consent of Congress, from laying any imposts or

Philadelphia, &c. R. R. Co. v. Pennsylvania.

duties on imports or exports, except what may be absolutely necessary for executing the inspection laws." It was claimed in the state courts that the act was unconstitutional so far as it taxes that portion of the gross receipts of companies which are derived from transportation from the state to another state, or into the state from another, and the supreme court of the state having decided adversely to the claim, the case has been brought here for review.

We have recently decided in another case between these parties that freight transported from state to state is not subject to state taxation because thus transported. Such a burden we regard as an invasion of the domain of federal power, a regulation of inter-state commerce, which Congress only can make. If, then, a tax upon the gross receipts of a railroad or a canal company, derived in part from the carriage of goods from one state to another, is to be regarded as a tax upon inter-state transportation, the question before us is already decided. The answer which must be given to it depends upon the prior question, whether a tax upon gross receipts of a transportation company is a tax upon commerce, so far as that commerce consists in moving goods or passengers across state lines. No doubt every tax upon personal property, or upon occupations, business, or franchises, affects more or less the subjects and the operations of commerce. Yet it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the constitution. We think it may safely be asserted that the states have authority to tax the estate, real and personal, of all their corporations, including carrying companies, precisely as they may tax similar property when belonging to natural persons, and to the same extent. We think, also, that such taxation may be laid upon a valuation, or may be an excise, and that in exacting an excise tax from their corporations the states are not

Philadelphia, &c. R. R. Co. v. Pennsylvania.

obliged to impose a fixed sum upon the franchises or upon the value of them, but they may demand a graduated contribution, proportioned either to the value of the privileges granted, or to the extent of their exercise, or to the results of such exercise. No mode of effecting this, and no forms of expression which have not a meaning beyond this, can be regarded as violating the constitution. A power to tax to this extent may be essential to the healthy existence of the state governments, and the federal constitution ought not to be so construed as to impair, much less destroy, anything that is necessary to their efficient existence. But, on the other hand, the rightful powers of the national government must be defended against invasion from any quarter, and if it be, as we have seen, that a tax on goods and commodities transported into a state, or out of it, or a tax upon the owner of such goods for the right thus to transport them, is a regulation of interstate commerce, such as is exclusively within the province of Congress, it is, as we have shown in the former case, inhibited by the constitution.

Is, then, the tax imposed by the act of February 23, 1866, a tax upon freight transported into or out of the state, or upon the owner of freight, for the right of thus transporting it? Certainly it is not directly. Very manifestly it is a tax upon the railroad company, measured in amount by the extent of its business, or the degree to which its franchise is exercised. That its ultimate effect may be to increase the cost of transportation must be admitted. So it must be admitted that a tax upon any article of personal property that may become a subject of commerce, or upon any instrument of commerce, affects commerce itself. If the tax be upon the instrument, such as a stage coach, a railroad car, or a canal, or steamboat, its tendency is to increase the cost of transportation. Still it is not a tax upon transportation, or upon commerce, and it has never

Philadelphia, &c. R. R. Co. v. Pennsylvania.

been seriously doubted that such a tax may be laid. A tax upon landlords as such affects rents, and generally increases them, but it would be a misnomer to call it a tax on tenants. A tax upon the occupation of a physician or an attorney, measured by the income of his profession, or upon a banker, graduated according to the amount of his discounts or deposits, will hardly be claimed to be a tax upon his patients, clients, or customers, though the burden ultimately falls upon them. It is not their money which is taken by the government. The law exacts nothing from them. But when, as in the other case between these parties, a company is made an instrument by the laws to collect the tax from transporters, when the statute plainly contemplates that the contribution is to come from them, it may properly be said they are the persons charged. Such is not this case. The tax is laid upon the gross receipts of the company ; laid upon a fund which has become the property of the company, mingled with other property, and possibly expended in improvements or put out at interest. The statute does not look beyond the corporation to those who may have contributed to its treasury. The tax is not levied, and indeed such a tax cannot be, until the expiration of each half year, and until the money received for freights, and from other sources of income, has actually come into the company's hands. Then it has lost its distinctive character as freight earned by having become incorporated into the general mass of the company's property.

While it must be conceded that a tax upon interstate transportation is invalid, there seems to be no stronger reason for denying the power of a state to tax the fruits of such transportation after they have become intermingled with the general property of the carrier, than there is for denying her power to tax goods which have been imported, after their original packages have

Philadelphia, &c. R. R. Co. v. Pennsylvania.

been broken, and after they have been mixed with the mass of personal property in the country. That such a tax is not unwarranted is plain. Thus, in *Brown v. Maryland*, 12 *Wheat.* 419-441, where it was ruled that a state tax cannot be levied by the requisition of a license upon importers of foreign goods by the bale or package, or upon other persons selling the same by bale or package, Chief Justice MARSHALL, considering the dividing line between the prohibition upon the states against taxing imports and their general power to tax persons and property within their limits, said that "when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has perhaps lost its distinctive character as an import, and has become subject to the taxing power of the state." This distinction in the liabilities of property in its different stages has ever since been recognized. *Waring v. Mayor*, 8 *Wall.* 122; *Perviar v. Commonwealth*, 5 *Id.* 479. It is most important to the state that it should be. And yet if the states may tax at pleasure imported goods, so soon as the importer has broken the original packages, and made the first sale, it is obvious the tax will obstruct importation quite as much as would an equal impost upon the unbroken packages, before they have gone into the markets. And this is so, though no discrimination be made.

There certainly is a line which separates the power of the federal government to regulate commerce among the states, which is exclusive, from the authority of the states to tax persons, property, business, or occupations within their limits. This line is sometimes difficult to define with distinctness. It is so in the present case, but we think it may safely be laid down that the gross receipts of railroad or canal companies, after they have reached the treasury of the carriers, though they may have been derived in part

Philadelphia, &c. R. R. Co. v. Pennsylvania.

from transportation of freight between states, have become subject to legitimate taxation. It is not denied that net earnings of such corporations are taxable by state authority without any inquiry after their sources, and it is difficult to state any well founded distinction between the lawfulness of a tax upon them and that of a tax upon gross receipts, or between the effects they work upon commerce, except perhaps, in degree. They may both come from charges made for transporting freight or passengers between the states, or out of exactions from the freight itself. Net earnings are a part of the gross receipts.

There is another view of this case to which brief reference may be made. It is not to be questioned that the states may tax the franchises of companies created by them, and that the tax may be proportioned either to the value of a franchise granted, or to the extent of its exercise; nor is it deniable that gross receipts may be a measure of proximate value, or if not, at least of the extent of enjoyment. If the tax be in fact laid upon the companies, adopting such a measure imposes no greater burden upon any freight or business from which the receipts come, than would an equal tax laid upon a direct valuation of the franchise. In both cases, the necessity of higher charges to meet the exaction is the same.

Influenced by these considerations, we hold that the act of the legislature of the state imposing a tax upon the plaintiffs in error, equal to three-quarters of one per cent. of their gross receipts, is not invalid, because in conflict with the power of Congress to regulate commerce among the states. And under the decision made in *Woodruff v. Parham*, 8 *Wall.* 123, it is not invalid because it lays an impost or duty on imports or exports.

MILLER, FIELD, and HUNT, JJ., dissented.

BY THE COURT.—Judgment affirmed.

People *ex rel.* Buffalo, &c. R. R. Co. *v.* Barker.

THE PEOPLE *EX REL.* THE BUFFALO & STATE
LINE RAILROAD COMPANY *v.* BARKER.

48 *New York*, 70.

New York Commission of Appeals; September Term,
1871.

Taxation of real estate of railway corporation. In assessing real property belonging to a railway company, consisting of a strip of land but a few rods in width, upon which the railroad track is located, with the necessary stations, buildings, &c., the land should not be assessed as an isolated piece of property, but as part of the whole railway; and its value should be estimated in connection with its position, and the business and profit derived therefrom.

The provision of 1 *N. Y. Rev. Stat.* 889, § 6,—that “the real estate of all incorporated companies liable to taxation shall be assessed in the town or ward in which the same shall be, in the same manner as the real estate of individuals,”—applies to lands of a railway company over which their road is located; and such land is properly assessed to the railway company by the assessors of the town or ward in which it is situated, and not as “non-resident” lands. *It seems*, that, within the meaning of the laws for the assessment of taxes, a railroad corporation is a resident of all the towns through which its road is located.

Appeals to the New York commission of appeals from the general term of the supreme court in the eighth judicial district.

These were proceedings in two cases, by certiorari, to review assessments of taxes against the relator. The questions arising in both cases were the same.

The relator is a corporation organized under the general railroad law of New York, and its railway is built and in operation through the towns of Evans and Hamburg in that state. The assessors of each of those

People *ex rel.* Buffalo, &c. R. R. Co. v. Barker.

towns placed the lands belonging to the company, including the land over which the track was located, upon their assessment rolls in 1866, fixing a valuation. The vice-president appeared before the assessors in each town, and gave evidence tending to show that the value of the property was less than that fixed by the assessors. A slight reduction of the valuation was thereupon made in both cases, but the amounts on the rolls still greatly exceeded those stated by the vice-president of the company.

Writs of certiorari were afterward sued out by the company against the assessors and supervisor of each town. The returns to these writs showed that the tax was imposed by the assessors as for "resident" lands, and not as for "non-resident" lands. The general term retained the writs as to the supervisors, but affirmed the proceedings of the assessors, holding that their duty was ended before service of the writs; from which decision the relator appealed.

John Ganson, for appellants.

P. G. Parker, for respondents.

HUNT, C.—Two principal points are urged by the appellants' counsel, upon which it is insisted that the judgments in question should be reversed. These are: 1. That the assessors adopted an erroneous principle in ascertaining the value of the relator's lands within their district; 2. That the assessment should have been made as for non-resident lands, and not against the relator personally as for resident lands. These points are elaborated into several branches, and I will consider such of them as seem to be important.

In the town of Hamburg the real estate of the relator was assessed at two hundred and twenty-five thousand dollars. The vice-president of the road gave

People *ex rel.* Buffalo, &c. R. R. Co. v. Barker.

evidence tending to show that it was worth only sixty-eight thousand six hundred and sixty-seven dollars; and it is insisted that his evidence was controlling, and that a judgment should have been given in accordance with it. Again, it is insisted that the value of the land and its superstructure simply, without reference to its connections at either end, or its general profit, should determine the amount of the assessment.

A reference to the statutory provisions on the subject of the assessment and taxation of real estate is necessary to a proper understanding of this subject.

It is provided, in general terms, that "all lands and all personal estate within this state, whether owned by individuals or corporations, shall be liable to taxation, subject to the exemptions hereafter specified." 1 *Rev. Stat.* 387, § 1. The exemptions do not relate to anything here in question. "Every person shall be assessed in the town or ward where he resides when the assessment is made, for all lands then owned by him within such town or ward, and occupied by him, or wholly unoccupied." *Id.* 389, § 1. "The real estate of all incorporated companies liable to taxation shall be assessed in the town or ward in which the same shall lie, in the same manner as the real estate of individuals." *Id.* § 6. These statutes are intended to provide that all real and personal estate within this state, with a few exceptions not necessary to be considered, shall be liable to taxation.

As to the manner in which the assessment shall be made, many directions are given. It is provided that "all real and personal estate shall be estimated by the assessors at its just and full value, as they would appraise the same in payment of a just debt due from a solvent debtor." *Id.* 393, § 17; *Laws of 1851*, ch. 176. This rule is to be followed in all assessments, "except where the assessors shall be specifically required, by law, to observe a different rule." *Id.* A provision is

People *ex rel.* Buffalo, &c. R. R. Co. v. Barker.

made for the re-examination of those cases where a party deems himself aggrieved by the assessment, to wit, "they shall hear and examine all complaints in relation to such assessments as shall be brought before them." *Laws of 1851, supra.* These complaints are to be determined in accordance "with section 15 of title 2." The original section 15 here referred to, with sections 16 and 17, and the amendments of the same by the act of 1851, are important to be understood. Section 15, as it originally stood, enacted that any person whose real and personal estate was taxed, might present an affidavit to the assessors to the effect that the real or personal estate owned by him did not exceed in value a certain sum to be named, and it was made the duty of the assessors to assess the same at the sum named and no more. *Rev. Stat.* as amended. Section 16 contained the same authority as to trustees. In section 17 it was declared that all real and personal estate, the value of which shall not have been so specified by affidavit, shall be estimated at its full value, as the assessors would appraise the same in payment of a just debt due from a solvent debtor. *Id.* Under this statute it was the evident duty of the assessors to value the property at the sum specified in the affidavit, although their own judgment may have been entirely different, or although they may have been satisfied that the statements were dishonestly made. A different rule was established by the act of 1851 (ch. 176, p. 332). It was there enacted that the sections 15, 16, 22, 23, 24, 25, and 26 should be repealed, and that section 17 should be amended so as to read as follows: "All real and personal estate liable to taxation shall be estimated and assessed by the assessors at its full and true value, as they would appraise the same in payment of a just debt due from a solvent debtor." The other sections declared to be repealed, with the substitutes, are equally significant. By section 22, thus

People *ex rel.* Buffalo, &c. R. R. Co. v. Barker.

repealed, it was declared that at their meeting for review, if a person had not previously made an affidavit, he might then make it, and the assessors should reduce the assessment to the sum specified in the affidavits. Section 23 authorized the proof to be made by other means than the affidavit of the party. Section 26 gave the form of the certificate to be made by the assessors to the effect that they had assessed the real estate according to their best information, and that, with the exception of those cases in which the value had been sworn to by the owner, they had estimated the value at the sum at which they would appraise the same in payment of a just debt due from a solvent debtor. A similar statement was contained in it in respect to personal estate. This was all changed by the law of 1851. The certificate then stated that they had set down all the real estate according to their best information, and that, with the exception of those cases in which the value had been changed by reason of the proof produced, they had estimated the value at the sum at which they would appraise the same in payment of a just debt due from a solvent debtor.

Assessors are citizens chosen from their respective towns, who, in theory of law and in fact, have personal knowledge of the value of the real estate in their towns. In the first instance they form their own judgment of the value of each piece of real estate and place it in the third column of their assessment roll. This judgment they form from the best information in their power, derived from their own knowledge and experience, and from such communications as they may confide in. According to the system in force before 1851, this judgment gave way, absolutely, to the affidavit of the owner. His statement of value was conclusive, and it was the duty of the assessors to adopt it, whatever their own judgment might be. According to the law of 1851 this affidavit was evidence before them, and to be con-

People *ex rel.* Buffalo, &c. R. R. Co. v. Barker.

sidered by them with the other means of information in their power, and, upon the whole, their own judgment was to be formed of the value. If this proof or any other evidence before them "changed the value of the real estate," they accepted such change and gave the statement. If it changed it to the extent claimed by the owner, or if only to a modified extent, the value was stated accordingly. It was the evident intention of the legislature to abolish the rule that the affidavit of the owner should be conclusive evidence of value. There is no rule left except the judgment of the assessors upon the whole case, the affidavit included. The statute of 1858 (ch. 536, p. 122) adopted and confirmed the rule of the statute of 1851 in this respect. After the examination is taken, and after hearing such further evidence as may be given, "they shall fix the value at such sum as they may deem just under the rule prescribed by section 20 of this title." The only rule prescribed in the title is the amended one, which I have already cited from the statute of 1851. I am quite satisfied, therefore, that the assessors acted legally in deciding upon their own judgment, not giving full credit to the opinions or statements contained in the examination of the relator's vice-president, if their judgments were not convinced thereby.

Nor do I see any error in the principle said to have been adopted in determining the value of the land in question. In Hamburg the land amounted to 82,77¹/₂ acres. It was a narrow strip of a few rods in width, with the buildings, stations, &c., necessary for the accommodation of a railroad. The argument of the relator's counsel is that this should be assessed as an isolated piece of land, having in substance no beginning or end; that is, not connected with anything at either end beyond the limits of the town. A railroad through the town of Hamburg only, having no connection at either end, would be of no value. The erections and

People *ex rel.* Buffalo, &c. R. R. Co. v. Barker.

superstructure would destroy its value for farming purposes. As a railroad it would have no passengers and no business, and would be worthless. The attempt to use it as such would involve debt and embarrassment, and no profit. In like manner the portion of the Erie canal passing through a single town, with no outlet at either end, would be valueless. A mill-race disconnected from the mill would be of no value. The mill severed from its race would be of little value. A block of stores, walled off from all neighboring connections, or deprived of the value resulting from adjoining business and commerce, would be of little value. Each item of property, however, with its connections and accompaniments, and used for the purpose and in the manner intended, might be of great value. Each piece of property is to be estimated in connection with its position, and the business and profit to be derived therefrom. The road in question is part of a whole, and is to be valued as such. This is independent of the taxation of the capital. It is an estimate of the value of the real estate for railroad purposes, and not at its value for a church or a banking-house. The capital of the railroad is ascertained and taxed at the place where its principal place of business is situated. That is not in Hamburg nor in Evans, so far as the papers show, and whether the capital is one hundred thousand or one million dollars should not affect the present assessment, and, so far as the case shows, did not affect it.

The law seems to be reasonably certain upon this branch of the case. In the first general point of the appellant and its branches, I find nothing to justify a reversal of the judgment.

The appellant objects again that the lands in question are not assessed according to the forms prescribed by the statute. They are assessed to the relator personally, while it is insisted that they come properly under the head of "non-resident lands," and should

People *ex rel.* Buffalo, &c. R. R. Co. v. Barker.

have been so assessed. It is idle to deny that the proper mode of assessing these lands is involved in much doubt. This arises from the fact that when the tax laws of this state were passed, railroad corporations were unknown to us. No such institutions then existed in the state, and the laws respecting the assessment and taxation of real and personal estate reach them only, and quite awkwardly, through the laws respecting incorporations generally.

It is provided in general terms that the real estate of all incorporated companies liable to taxation shall be assessed in the town or ward in which the same shall lie, in the same manner as the real estate of individuals. 1 *Rev. Stat.* 389, § 6. As to individuals, the following provisions are made, on the same page: 1. "Every person shall be assessed in the town or ward where he resides when the assessment is made for all lands then owned by him within such town or ward, and occupied by him or wholly unoccupied." This section authorizes the assessment of lands to an individual, with the following limitations: 1. The lands must lie in the same town or ward in which the owner resides: 2. They must be occupied by him; or, 3. They must be wholly unoccupied. The lands in question, I think, are occupied by the relator, and it was the opinion of the general term of the eighth district, in this case, that the relator might fairly be said to reside in every town through which its road passed. If so, the case falls evidently within the section quoted. If otherwise, then as evidently they cannot be assessed under that section.

The next section of the statute provides, that "lands occupied by a person other than the owner may be assessed to the owner or occupant, or as non-resident lands." As the lands in *Hamburgh and Evans* were not occupied by a person other than the owner, this section does not meet the case.

People *ex rel.* Buffalo, &c. R. R. Co. *v.* Barker.

The third section enacts, that "unoccupied lands, not owned by a person residing in the town or ward where the same are situated, shall be denominated 'lands of non-residents,' and shall be assessed as hereinafter provided." Land cannot be deemed unoccupied that is fenced in, having a structure which is daily and hourly used for the passage of men and cars, having on it houses and buildings in which men eat and drink and sleep and spend their days. Lands that are unoccupied are the only lands that are to be denominated lands of non-residents, and assessed as such. The lands in question do not come under this provision. It is not easy to find the power of assessing these lands under any of the statutes which I have quoted, unless the company shall be deemed a resident of every town in which it owns lands.

The regulations for the assessment of taxes on incorporated companies are found in a subsequent part of the statutes. 1 *Rev. Stat.* 414. It is there provided, that "all moneyed or stock corporations, deriving an income from their capital or otherwise, shall be liable to taxation on their capital in the manner hereinafter prescribed." § 1. The second section is as follows: "The president . . . or other proper officer of every such incorporated company shall, on or before the first day of July in each year, make and deliver to the assessors, or one of them, of the town or ward in which such company is liable to be taxed according to the provisions of section 6 of the second title of this chapter, a statement specifying, 1. The real estate, if any, owned by such company, the towns or wards in which the same is situated, and the sums actually paid therefor; 2. The capital stock actually paid in, or secured to be paid in, excepting therefrom the sums paid for real estate, and the amount of such capital stock held by the state or by any incorporated literary or charitable institution; and, 3. The town or ward in which

People *ex rel.* Buffalo, &c. R. R. Co. *v.* Barker.

the principal office or place of transacting the financial business of such company is situated, or, if there be no such principal office, the town or ward in which its operations are carried on, or in which it is liable to be taxed under the provisions of this chapter."

Section 6 then provides, that "the assessors shall enter all incorporated companies from which statements shall have been received by them, and the property of such companies, and the property of all other incorporated companies, liable to taxation, in their respective towns, in the following manner: 1. They shall insert in the first column of their assessment rolls the name of each incorporated company in their respective towns or wards liable to taxation on its capital or otherwise, and under its name they shall specify the amount of its capital stock paid in and secured to be paid in, the amount paid by such company for real estate then belonging to such company, wherever the same may be situated, the amount of all surplus profits or reserved funds exceeding ten per cent. of their capital, after deducting therefrom the said amount of said real estate, and the amount of its stock, if any, belonging to the state or to any literary or charitable institution; 2. In the second column they shall enter the quantity of real estate owned by said company and situated within their town or ward; and in the third column the actual value thereof, estimated as in other cases; 3. In the fourth column they shall enter the amount of the capital stock of every incorporated company paid in and secured to be paid in, and of all surplus profits or reserved funds as aforesaid, after deducting the sums paid out for all the real estate of the said company, wherever the same may be situated and then belonging to it, and the amount of stock, if any, belonging to the state and to incorporated literary and charitable institutions." By section 15 the amount of taxes assessed on all incorporated companies liable to taxation

People *ex rel.* Buffalo, &c. R. R. Co. v. Barker.

shall be set down by the board of supervisors in the fifth column of the corrected assessment roll, and shall form a part of the moneys to be collected by the collector.

It is further provided that the collector shall demand the tax of the proper officer; if not paid, shall endeavor to collect the same, and if unsuccessful shall return an affidavit thereof to the county treasurer, who shall certify the same to the comptroller, who shall pass the same to the credit of the county treasurer "as in the cases of taxes on the lands of non-residents." §§ 17-21.

The provisions of this title are intended primarily to furnish the means and the rule of assessing the capital stock of incorporated companies, where such capital is assessable, and at the place where its chief place of business is situated. They also furnish, I think, a sufficient basis for assessment and taxation of the lands of a railroad company in those towns and counties remote from its principal place of business. The following, among other reasons, suggest themselves: 1. It is the evident intention of the statute that the real estate of all persons and corporations, wherever situated, shall be subject to taxation. Thus it is expressly enacted that "all lands and all personal estate within this state, whether owned by individuals or corporations, shall be liable to taxation, subject to the exemptions hereinafter specified." 1 *Rev. Stat.* 388, § 1. And again: "The real estate of all incorporated companies liable to taxation shall be assessed in the town or ward in which the same shall lie, in the same manner as the real estate of individuals." *Id.* 389, § 6. In my reading of the statutes there is no other place than in this title, in which provision is made for the taxation of lands owned by a railroad company, occupied by them but located in a town or ward of which they are not residents, or where their principal place of

People *ex rel.* Buffalo, &c. R. R. Co. v. Barker.

business is not located. The declaration is express that such lands shall be taxed, and in the towns where situated. For the past thirty years, and within the knowledge of every legislature, they have been so taxed by the towns. If there is, then, to be found, in this statute, language which justifies this action of the assessors, although not intended primarily for that purpose, and although not so explicit in its terms as if it had been primarily so intended, it should be deemed to express the intention of the legislature, and the action of the assessors should be sustained.

2. That the provisions of the statute regulating the assessment of incorporated companies justifies the action we are considering, may be inferred from the language of section 2. p. 414, § 2. The president is there directed to deliver the statement above described "to the assessors of the town or ward in which such company is liable to be taxed, according to the provisions of section 6 of the second title of this chapter." Here is a declaration that the company is liable to be taxed according to the provisions of section 6. Upon turning to that section, we find this definition of such liability :

"Section 6. The real estate of all incorporated companies liable to taxation shall be assessed in the town or ward in which the same shall be, in the same manner as the real estate of individuals." . . . p. 389.

It is conceded that the relator is an incorporated company, liable to taxation, and we have in this section 6 a declaration that its real estate shall be assessed in the town or ward in which the same shall lie. The assessors of Hamburgh and Evans, finding portions of its real estate in their respective towns, have acted upon this authority, and included the same in their assessment rolls.

3. The action of the assessors, directed to be taken upon the receipt of the statement already referred to

People *ex rel.* Buffalo, &c. R. R. Co. v. Barker.

(p. 415); has a bearing upon the question before us. By section 6 they are directed to enter in their assessment rolls all incorporated companies from which statements shall be received, "and the property of such company liable to taxation in their respective towns, in the following manner." This language includes all their property, the capital not only, but the real estate; the real estate in the town of its residence or place of business not only, but the real estate wherever situated. It is also to be entered by the assessors in their respective towns, and in their assessment rolls, thus indicating the several towns and several rolls where lands may be, rather than one roll and one town where its capital is to be taxed.

4. The assessors are directed to insert in the first column the name of each incorporated company in their town or ward liable to taxation on its capital or otherwise. *Id.* If in such town the company is liable to taxation on its capital, its name is to be entered. If it is not then liable to taxation on its capital, but is liable to taxation for any other cause, "or otherwise," it is to be so entered. In the town of Hamburg, the relator, if not liable to taxation on its capital, was liable to taxation for another cause, to wit, the ownership of real estate in the town, and its name was therefore properly entered.

5. The assessors in question perhaps had not the means nor was it their duty to enter the amount of the relator's capital stock, with the deductions pointed out by this statute. They had no power to make the basis of a tax on its capital, and a statement or assessment of its capital was not necessary, perhaps not possible. The entries required by subdivisions 1 and 3 were, therefore, not attempted to be made. Subdivision 2 required the entry in the roll of the quantity of real estate of the company situate within the town, and of its actual value estimated as in other cases. While this

People *ex rel.* Buffalo, &c. R. R. Co. *v.* Barker.

duty would be exercised by the assessors who also assessed the capital stock, the language is pertinent and appropriate to an assessment of real estate only. The directions are appropriate to those assessors upon whom a duty is devolved. Where the duty is not devolved upon certain assessors, to them such portions of the directions are not applicable.

I prefer to base my judgment in the case upon the theory that a reasonable construction of the statutes regulating the taxation of incorporated companies, embraces the case before us, to holding that the relator is a resident of any town through which its road passes. On that proposition I express no opinion.

Upon the whole case, I am of the opinion that the action of the assessors of the towns of Hamburg and Evans was justified by law, and that the judgments below should be affirmed, with costs.

All concur.

LOTT, Ch. C., LEONARD, GRAY, and EARL, CC., also for affirmance on the ground that railroad corporations are residents of each town or ward where they own real estate, within the provisions of the tax laws.

Judgments affirmed.

Buffalo, &c. R. R. Co. v. Supervisors of Erie.

THE BUFFALO & STATE LINE RAILROAD COM-
PANY v. THE SUPERVISORS OF ERIE
COUNTY.

48 *New York*, 98.

New York Commission of Appeals; September Term,
1871.

Taxation of real estate of railway corporation. For purposes of taxation a railway corporation is to be regarded as a resident of each town and county through which its road passes; and its real estate may therefore be properly assessed in the town or county where the land is situated, as real estate of a resident, and not as land of a non-resident.

The decision of the assessors upon the question whether real estate of a railway corporation, whose principal office is located in another county, shall be assessed as resident or non-resident land, cannot be attacked collaterally. In all cases within their jurisdiction assessors act judicially in making assessments, and the assessment roll has the force of a judgment. The tax so assessed by them cannot be recovered back after it has been paid into the public treasury.

Appeals to the New York commission of appeals from the general term of the superior court of Buffalo.

These were four actions for money had and received by the defendants belonging to the plaintiff.

The plaintiff is a railway corporation created by the laws of New York. Its track extends from Buffalo west through several towns of Erie county. In two of these towns,—Hamburgh and Evans,—taxes for the years 1865 and 1866 were assessed and collected upon the lands occupied by the plaintiff in those towns. The lands were used by the plaintiff for the usual purposes of a railway, the track, with depots, water stations, &c.,

Buffalo, &c. R. R. Co. v. Supervisors of Erie.

having been constructed and engines and cars run thereon. The taxes were assessed in each town as upon lands of a resident, and were collected by levy upon and sale of personal property belonging to the plaintiff. The money was paid into the county treasury. Two of the four actions were for taxes collected for the years named upon lands in the town of Hamburg, and two for taxes upon lands in the town of Evans.

A motion to dismiss the complaint, made by the defendants in each case, upon the ground of want of jurisdiction of the superior court of Buffalo, was denied, and the defendants excepted.

Motions were also made for nonsuit on the grounds that on the facts proved an action for money received could not be maintained; that no cause of action was shown against the defendants; that the tax was legally assessed and collected. These motions were also denied, and the defendants excepted. In one of the cases, tried by the court, the judge found, as conclusions of law, that the lands should have been assessed as lands of a non-resident; that the assessment was void; and that the plaintiff was entitled to recover. To these conclusions of law the defendants also excepted.

In three of the cases judgments were rendered in favor of the plaintiff, and were affirmed by the general term. In the fourth, judgment was ordered for the plaintiff upon exceptions heard in the first instance at general term. From these judgments the defendants appealed

P. G. Parker, for appellants.

John Ganson, for respondent.

LEONARD, C.—The regularity of these assessments has been fully considered in two other cases between the same parties, in respect to the tax assessed by these

Buffalo, &c. R. R. Co. v. Supervisors of Erie.

towns for the year 1866.* In those cases the question came up from the general term of the supreme court, where it had been taken by certiorari, and the validity of the assessments sustained. The subject has been there examined in detail. If the assessments were a nullity, or void for the want of jurisdiction to impose them, it must be conceded that these actions were well brought. *Whitney v. Thomas*, 23 N. Y. 281. The lands in that case were assessed to William Merritt as the lands of a resident. The lands belonged in fact to Ogden, a non-resident; but they were not so assessed, and appeared on the assessment roll as the lands of a resident. The lands having been sold by the comptroller of the state, the non-resident owner brought ejectment and recovered them. The sale was held to be void. The comptroller was without any authority of law to make a sale for taxes of lands assessed on the roll to a resident owner, and his deed as well as the sale was void. The assessment was also held to be void in that case for another reason, affecting the jurisdiction of the assessors. The lands were not assessed according to the fact, either as the lands of a resident owner or of a non-resident. They were assessed to a third person, who had no ownership or possession, and no connection with them. It was not a mere error of the assessors, but a disregard of the facts of the case. They entered a false judgment, not warranted by any facts proven. It could not be called a mistake of law or fact, such as the assessors, acting as *quasi* judicial officers, might honestly make. It was simply an assessment, without the slightest color to warrant or authorize it. Assessors can have no jurisdiction to assess any of the lands in their town to third persons who do not own, possess, or have any connection therewith. It was there said: "If lands, belonging either to a resi-

**Ante*, p. 149.

Buffalo, &c. R. R. Co. v. Supervisors of Erie.

dent or non-resident, could be assessed to a third person, having no connection with the premises, and be made the foundation of a sale or conveyance by the comptroller, great inconvenience and injustice might result. The true owner might be misled. He would have no notice of the assessment or of the proceedings upon it, and it would require extraordinary vigilance to discover and trace out such proceedings." This case was much relied on by the respondent's counsel, but it is not applicable here, unless the assessors were without jurisdiction. Jurisdiction is a subject which relates to the power of the court, and not to the right of the parties as between each other. *People v. Sturtevant*, 9 *N. Y.* 269. If the law confers the power to render a judgment, then the court has jurisdiction; what shall be adjudged between the parties, and with which is the right, is judicial action by hearing and determining it. *Rhode Island v. Massachusetts*, 12 *Pet.* 718.

When a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment is binding in every other court. But if it act without authority, its judgments are nullities. *Elliot v. Piersol*, 1 *Pet.* 328, 340; *Wilcox v. Jackson*, 13 *Id.* 511.

When the statute prescribes the mode of acquiring jurisdiction, the mode pointed out must be complied with, or the proceeding will be a nullity. *Bloom v. Burdick*, 1 *Hill (N. Y.)* 130.

Objections not relating to the jurisdiction of the officer cannot be raised collaterally. *Rusher v. Sherman*, 28 *Barb. (N. Y.)* 416; *Stanton v. Ellis*, 12 *N. Y.* 575.

These axioms are elementary.

The assessors of the towns of Hamburg and Evans had jurisdiction to assess all the lands in their respective towns. It was made their duty, peremptorily, to do so. An error of judgment, as to the right or duty

Buffalo, &c. R. R. Co. v. Supervisors of Erie.

to impose the assessment on particular lands in the town, as to which an exemption is claimed, is not jurisdictional. *Barhyte v. Shepherd*, 36 N. Y. 238.

A flagrant disregard of the facts, or assessing in opposition to the clear and undisputed facts, where the application of the statute could not by any means be doubtful, might, as in the case of *Whitney v. Thomas* (*supra*), present a case where the officer would be without jurisdiction—assessing the lands of Ogden, a non-resident, as the lands of Merritt, a resident, who was neither an owner nor occupant, nor in any way connected with the land, appears to be such a flagrant disregard of the facts as to be a willful perversion of judgment, not to be regarded as an error, but as a judgment without jurisdiction. I think the court of appeals so regarded it. The application of the principle to the facts of each particular case is often attended with difficulty.

The assessors are *quasi* judicial officers, and the assessment roll, when finally completed by the supervisors of the county, stands as a judgment. *Barhyte v. Shepherd*, *supra*; *Swift v. Poughkeepsie*, 37 N. Y. 511.

The validity of a judgment which is not void, but only voidable, cannot be assailed collaterally. It can be attacked for fraud, or mistake as to the facts, only by a direct issue as to such facts. The case of *Swift v. Poughkeepsie*, 37 N. Y. 511, like the present one, was an action to recover for money had and received under an alleged illegal levy and collection of a tax. The court there said that "a party cannot proceed a step in such an action, if, in order to sustain it, the court is called upon to review the merits or the regularity of the proceedings or determination, as the result of which the money was collected or paid over." p. 514. It was also held that the proper remedy was by certiorari. The application of that remedy, in cases of irregular or

Buffalo, &c. R. R. Co. v. Supervisors of Erie.

illegal assessments, has since been affirmed, in *People v. Assessors of Brooklyn*, 39 *N. Y.* 81, and *People v. Assessors of Albany*, 40 *N. Y.* 155.

The informalities of the affidavit of the assessors do not render the assessment void. The statute is substantially followed. *Parish v. Golden*, 35 *N. Y.* 462. The objection that the superior court of Buffalo had no jurisdiction of this action is not tenable.

Persons having causes of action against the county are authorized to commence their suits against the board of supervisors, and process shall be served on the chairman or clerk. 1 *Rev. Stat.* 901, §§ 1-3, 5th ed.

The summons was served in this case on the clerk of the board, at the city of Buffalo. This is to be regarded as a personal service on the board. The statute gives that court jurisdiction in any case where the defendant is personally served with summons in that city. *Sess. Laws* 1854, p. 225.

The board represents the county as a municipal corporation, and Buffalo is the county seat, where the sessions of the supervisors are held. The clerk resides and was served in that city. I think the defendants have been so served as to be within the meaning of the statute above referred to in regard to the jurisdiction of that court. On the ground first mentioned the judgment should be reversed and a new trial ordered, with costs to abide the event.

EARL, C.—These are actions to recover money collected from the plaintiff, upon what is alleged to be a void assessment made in 1865 upon land of plaintiff, situated in the town of Hamburg, Erie county. The principal allegation of error in the assessment is that the land was assessed *in personam* as the land of a resident of that town, and not as non-resident land. I believe the assessment was correctly made. The statute

Buffalo, &c. R. R. Co. v. Supervisors of Erie.

(1 *Rev. Stat.* 388, § 1, Edmonds' ed.) provides, that all lands within the state owned by individuals or by corporations shall be liable to taxation; and hence this land was liable to taxation somewhere. It is further provided (2 *Rev. Stat.* 389, § 1) that every person shall be assessed in the town or ward where he resides, when the assessment is made, for all lands then owned by him within such town or ward, and occupied by him or wholly unoccupied. Section 2 provides that land occupied by a person other than the owner may be assessed to the owner or occupant, or as non-resident land. This section undoubtedly means that when the owner and occupant both reside in the town where the land is situated, the land may be assessed to either. When the owner does not reside in the town and the occupant does, it must be assessed to the occupant; and when neither of them resides in the town it must be assessed as non-resident land. By no other construction can I see how occupied land can be assessed as non-resident land, as the statute as to the taxation of non-resident lands provides that land occupied by a resident of the town shall not be taxed as non-resident. 1 *Rev. Stat.* 392, § 13. Section 3 provides that unoccupied land not owned by a resident of the town shall be assessed as non-resident land, and section 9 provides that the assessors shall prepare an assessment roll and insert therein the names of the "taxable inhabitants" of the town. Taking all these provisions of the statute together, it seems to me quite plain that there is no authority for placing upon the assessment roll for a tax *in personam* the name of any person not an inhabitant of the town.

Section 6 provides that "the real estate of all incorporated companies liable to taxation shall be assessed in the town or ward in which the same shall lie, in the same manner as the real estate of individuals;" and hence it is claimed that unless the plaintiff can be re-

Buffalo, &c. R. R. Co. v. Supervisors of Erie.

garded, in some legal sense, as a resident of the town of Hamburg at the time of the assessment in 1865, there was no authority to insert its name in the assessment roll.

While corporations are artificial, intangible, invisible beings, yet, in law, they are treated sometimes as persons, occupants, inhabitants, citizens. They exist by force of law, and can have an existence only within the jurisdiction in which they are created. Under the act of congress of 1789, commonly called the judiciary act, jurisdiction was conferred upon the circuit courts of suits between a citizen of the state where the suit is brought and a citizen of another state. The supreme court of the United States has held that, within this act, a corporation was a citizen of the state where it was created. *Ohio and Mississippi R. R. Co. v. Wheeler*, 1 *Black*, 286. By statute, 22 *Hen.* 8, ch. 5, concerning bridges and highways, it was enacted that bridges and highways shall be made and repaired by "the inhabitants of the city, shire, or riding," and that the justices shall have the power to tax every "inhabitant of such city," &c., and that the collectors may "distrain every such inhabitant as shall be taxed and refuse payment, &c. Lord COKE (2 *Inst.* 703) says: "Every corporation and body politic residing in any county, riding, city, or town corporate, or having lands or tenements in any shire *quae propriis manibus et sumptibus possident et habent*, are said to be inhabitants there, within the purview of this statute." In *Rex v. Gardner*, *Cowp.* 79, the court of king's bench decided that a corporation came within the description of "occupiers or inhabitants" for the purpose of taxation, under a statute passed in the reign of Elizabeth.

It has been many times held by the courts that, under section 125 of the Code, requiring "actions to be tried in the county in which the parties, or any of them, shall reside at the commencement of the action,"

Buffalo, &c. R. R. Co. v. Supervisors of Erie.

a railroad corporation is a resident of every county through which its road passes; and it has been held that such a corporation is so far a resident of every county through which its road passes that it cannot be sued in justices' courts by short summons. *Belden v. New York and Harlem R. R. Co.*, 15 *How. (N. Y.)* 17; *Sherwood v. Saratoga, &c. R. R. Co.*, 15 *Barb. (N. Y.)* 650. In the latter case Mr. Justice WILLARD says: "A railroad company must be treated as an inhabitant and freeholder in each county where its track is laid." In *Glorie v. South Carolina R. R. Co.*, 1 *Strobh. (S. C.)* 70, it is said that the residence of a company is most obviously where it is actively present in the operations of its enterprise. It will thus be seen that while corporations, in their general aspect, are mere ideal existences, without body or soul, yet they will be considered inhabitants, residents, citizens, when the general spirit and purpose of the law require it.

This corporation was created by the laws of this state to construct and operate a railroad through a portion of the state, and for that purpose was authorized to take and hold real estate along the line of its road. It was, therefore, a citizen, inhabitant, and resident of this state, and either resided everywhere in the state, or at some place or places within it. To what particular locality in the state was its residence confined? Its residence might have been confined to a particular locality by some provision in its charter; but we are not informed that there was any such provision. It is claimed, however, by the plaintiff, that its residence was fixed in Buffalo, the place of its principal office, by the statute (1 *Ren. Stat.* 362, § 6), which provides that "all the personal estate of every incorporated company, liable to taxation on its capital, shall be assessed in the town or ward where the principal office or place for transacting the financial concerns of the company shall be; or if such company have no

Buffalo, &c. R. R. Co. v. Supervisors of Erie.

principal office or place for transacting its financial concerns, then in the town or ward where the operations of said company shall be carried on." This statute does not fix or intend to fix the residence of the corporation, but provides simply for the taxation of its personal estate. What, then, determines the location or residence of a corporation within this state? The provisions of its charter may do so. In the absence of such provisions, its nature, character, and mode of operations must determine this. A municipal corporation is confined to its territorial limits. Other corporations are organized to transact business in a particular town or city, and are thus located there, and a railroad which passes through several counties, and occupies lands in several counties for the carrying on of its corporate business, must, at least for the purpose of taxation, be regarded as a resident of each town or county through which it passes. Were it not for the statute above cited, its personal property would be taxed in the same way wherever it was found, not in transit, but for use in its corporate business; and to avoid confusion and uncertainty, and that all its taxable personal property might be reached, the above statute was passed. A corporation, for many purposes, lives, moves, and has its being in its agents, and wherever they are in possession of its real estate, carrying on its corporate business, it may be supposed to exist and reside, without departing from legal precedents or violating the spirit or letter of the law.

Hence, I reach the conclusion that the land of the plaintiff, situated in the town of Hamburg, was properly assessed and taxed as resident land, and this conclusion is fortified and sustained by considerable authority. *Mohawk, &c. R. R. Co. v. Clute*, 4 *Paige* (N. Y.) 384; *Albany, &c. R. R. Co. v. Osborn*, 12 *Barb.* (N. Y.) 223; *People v. Supervisors of Niagara*, 4 *Hill* (N. Y.) 20, 25; *People v. Fredericks*, 48 *Barb.*

Buffalo, &c. R. R. Co. v. Supervisors of Erie.

(*N. Y.*) 173; *People v. Beardsley*, 52 *Barb.* (*N. Y.*) 105, affirmed in the court of appeals, September, 1869; *People v. Cassity*, 2 *Lans.* (*N. Y.*) 294; and is in conformity with the general and almost, if not quite, uniform practice throughout the state.

But there is another answer to this action, as to which I am equally confident.

It is now settled that assessors, in making assessments, in all cases where they have jurisdiction, act judicially. *Swift v. Poughkeepsie*, 37 *N. Y.* 511; *Barhyte v. Shepherd*, 35 *Id.* 238. This land was situated in the town of Hamburg, and, hence, the assessors of that town had jurisdiction to assess it. In exercising this jurisdiction they were to decide not only all questions of fact involved, but also all questions of law. Among other things, they were to determine whether this land was to be assessed as resident or non-resident land, and that was a question of both law and fact. They were to determine the facts, and then whether these facts made it non-resident land. The question of law seems not to be a plain one, as the supreme court in the eighth district has decided it one way and the superior court of Buffalo the other way. In such a case, it cannot be that the assessors are to determine at their peril. On the contrary, I have no doubt that whichever way they decide they have the immunity of judicial officers; and as they will be protected, all persons who act upon their assessment in enforcing the tax will have equal protection; and the tax, after it has once reached the treasury of the county, can no more be collected back than if it had been placed there as the proceeds of a judgment of a regular court. It seems to me that this is the logical result of the decisions last above cited. Hence, the plaintiff, if it felt aggrieved by the action of the assessors in making this assessment, should have sought a review by certiorari, or in some other mode; and they cannot attack the

Buffalo, &c. R. R. Co. v. Supervisors of Erie.

decision of the assessors, collaterally, and treat it as void, as it must be treated in order to sustain a recovery in this action.

It is also claimed that the assessment was void on account of the defect in the affidavit attached to the roll by the assessors. In *Van Rensselaer v. Witbeck*, 7 *N. Y.* 517, the affidavit of the assessors was held to be so defective as to render the assessment void and the collection of the tax illegal. But that was a case where no presumptions could be indulged. The affidavit showed that the property had not been assessed according to law. In *Parish v. Golden*, 35 *N. Y.* 462, the affidavit of the assessors was not a literal compliance with the statute, and yet the assessment was held valid. The court decided that it was sufficient if the affidavit was a substantial compliance with the statute, and it was the opinion of the judge who wrote the opinion of the court, that unless the affidavit showed affirmatively that the assessors did not comply with the statute in making the assessment of property, it would be presumed that they had complied, and the assessment would be held valid. Without going so far in this case, we may hold that the affidavit, in every important particular, was a substantial compliance with the statute, and hence that the tax was not illegal on account of any informality in the affidavit.

The affidavit of the assessors was properly sworn to before a notary public under chapter 508 of the *Laws of 1863*.

I am, therefore, of the opinion that the assessment and tax in this case were not void, and that the plaintiff cannot maintain this action.

The judgment of the special and general terms should be reversed and new trial granted, costs to abide event.

All concur.

BY THE COURT.—Judgment reversed.

Matter of New York Central R. R. Co.

MATTER OF THE APPLICATION OF THE NEW YORK CENTRAL RAILROAD COMPANY.

49 N. Y. 414.

New York Court of Appeals; May Term, 1872.

Lease of railway. A lease by a railway corporation of its railroad, with all the land upon and across which its railroad or its machine shops, warehouses, freight or passenger depots or buildings are constructed, covers all land acquired by the lessor for use in operating the road, the use of which is advantageous and beneficial, and without which the use of the road or any part of it would be less convenient and valuable.

Prior to the execution of such a lease, a railway company had acquired the title to a strip of land for the purpose of using it as a street in connection with its railroad and depot, to enable it to operate its road in a more advantageous and convenient manner than it could do otherwise. *Held*, that the lease included such strip of land; and although neither the lessor nor the lessee actually obtained the use of the land as a street until it was taken for the construction of another railroad, the damages for such taking should embrace the injury to the depot, &c., by being deprived of its use; and the lessee was entitled to the money awarded as damages, during the term of the lease.

Appeal to the New York court of appeals from the general term of the supreme court in the eighth judicial district.

This was an application by the New York Central Railroad Company, for the appointment of commissioners to appraise certain lands belonging to the Buffalo, New York, and Erie Railroad Company, situated in the city of Buffalo, and sought to be condemned by the applicant for the purposes of its road. The commissioners were appointed, and the award made by

Matter of New York Central R. R. Co.

them confirmed. The money awarded was deposited under direction of the court for the benefit of those entitled to it as compensation.

The Buffalo, New York, and Erie Railroad Company, and the Erie Railway Company applied by petition for the money; the former claiming as owner in fee of the land taken; the latter, as lessee, in possession, of the land, under a lease from the former.

Upon these petitions, an order was made appointing a referee to take and report proofs as to the various interests in the money awarded, and to report also the facts found by him and his opinion thereon. He reported that the Erie Railway Company, the lessee of the land, was entitled to the use, during the lease, of the amount remaining after paying costs and expenses; subject, however, to the rights which might arise upon breach of condition of mortgages upon the real estate of the Buffalo, New York, and Erie Railroad Company, previously given to secure bonds issued by that company. This report was confirmed by the special term of the supreme court; and the Buffalo, New York, and Erie Railroad Company appealed from the order confirming the report, except the part relating to costs and expenses.

The general term of the supreme court reversed so much of the order of the special term, confirming the referee's report, as decided that the lease included the lands in question, and that the lessee, the Erie Railway Company, was entitled to the use of the money during the continuance of the lease; this decision of the general term being made on the ground that the land taken was not covered by the lease from the Buffalo, New York, and Erie Railroad Company to the Erie Railway Company. From this order of the general term the Erie Railway Company appealed.

The terms of the lease and other facts involved are stated more particularly in the opinion.

Matter of New York Central R. R. Co.

John Ganson, for the appellant.

Sherman S. Rogers, for the respondent.

GROVER, J.—Whether the appellant is entitled to the use of the money paid by the New York Central Railroad Company for the land, condemned for its use, during the term of the lease from the respondent to the appellant, depends upon the question whether the land, or the title of the respondent thereto, was embraced in the lease. The land was a strip thirty feet in width, extending easterly from Michigan-street to Chicago-street, in the city of Buffalo, a distance of about one hundred and ten feet. At the time of giving the lease by the respondent to the appellant, the former owned lands adjoining the strip in question on the north, and lying south of Exchange-street, upon which was located its passenger depot. The strip in question runs along south of these lands of the respondent, and in the rear of its depot.

About the year 1847 the several owners of the strip in question conveyed by deed to the Attica and Buffalo Railroad Company the use and occupancy of the strip, to be devoted to the public as a highway and street, which that company agreed to pave in two years from that time. The right of the latter company was afterward acquired by the New York Central Company. That company took possession of the strip and used it for railroad purposes, and never paved or opened it as a street. In the year 1857 the respondent acquired the fee of that portion of the strip condemned, subject to the right of the New York Central Company. The strip continued in the possession of the New York Central Company, the respondent never having had actual possession, but claiming the right to use the same as a street. Before the execution of the lease by the respondent to the appellant, in February, 1863,

Matter of New York Central R. R. Co.

the former commenced an action against the New York Central Company to compel it to pave and open the street for its and the public use, which action was pending at the time of the execution of the lease; and the New York Central Company had, at the same time, proceedings pending for appraisal of the land and acquiring title for the purposes of its road, free from its obligation to open it as a street. The description of the property demised is as follows: "The railroad of the party of the first part, including its branch freight track, and all the land of the party of the first part situate within and from the city of Buffalo to and within the village of Corning, in the county of Steuben, upon and across which its said railroad, or any part thereof, or its machine shop, warehouses, freight or passenger depots or buildings, are constructed within and between the places aforesaid, and all the right, title, and interest which the party of the first part has in and to the use of any wharves or docks in said city, or in or to any other branch track or tracks used by it in connection with its said railroad, together with the appurtenances thereunto belonging during said term."

The case shows that the respondent acquired title to the land lying north of the strip in question, and erected its depot thereon, relying upon the use of the strip in question as a street; and that the value of the use of such land will be much lessened for the purposes for which it was acquired if deprived of such use of the strip. The benefit to the respondent to be derived from such use, together with the commencement of the suit by it against the New York Central Company to secure such use, show that the respondent acquired its title to the strip to enable it to compel the New York Central Company to pave and open the street over the strip, to enable it to operate its railroad in a more advantageous and convenient manner than it otherwise could do. In other words, that the title to the strip

Matter of New York Central R. R. Co.

was acquired for the purpose of securing its use as a street in connection with the railroad ; and that use was highly beneficial to and convenient for the business of the respondent in the operation of its railroad. It is true that such use had not actually been obtained at the time of the execution of the lease to the appellant ; but the right thereto had been acquired, and legal proceedings to enforce it had been instituted and were then pending.

It is not material to determine whether the New York Central Company could have been compelled to pave and open the street ; a question somewhat discussed by counsel. As, if it could not, its right of occupying the strip for any purpose would terminate upon its refusal so to do ; and thus the estate of the respondent in the land would become absolute, and it could then enjoy it as a way to and from its depot as owner of the fee. Neither is the fact that the respondent had not acquired title to the entire strip, subject to the right of the New York Central Company, at all material. It had acquired title to all that part of it embraced in the present proceeding, and which was sufficient to secure the use of the entire strip as a street, or the damages sustained by being deprived of such use in case of its being taken for other purposes by the New York Central Company. The opinion of the general term conclusively shows that the strip of land in question cannot pass, under the lease, to the appellant as appurtenant to the other land demised ; that easements and servitudes only can so pass ; it being a maxim of the common law that land cannot be appurtenant to other land. But it is equally well settled that the intention of the parties, as ascertained from the language used in the instrument, is to govern their rights ; and that, in construing every written instrument, it is proper to look at all the surrounding circumstances, the pre-existing relation between the

Matter of New York Central R. R. Co.

parties; and then to see what they mean when they speak. *Blossom v. Griffin*, 13 *N. Y.* (3 *Kern.*) 569. Applying this rule to the present case, we find that at the time the respondent gave the lease to the appellant, it had acquired the right to use the strip as a street along side of its passenger depot, and grounds connected therewith, or to its damages if deprived thereof. That such use was convenient and advantageous thereto; that, deprived of such use, the depot and grounds would be of less value for railroad purposes; that the interest in the strip had been acquired for this purpose, and, in case the New York Central Company paved and opened it as a street, was of no value to the respondent for any other purpose. Under these circumstances the respondent leased its railroad, running from Buffalo to Corning, to the appellant. I think this not only included the railroad track and depots, but all the land acquired for use in operating the road, the use of which was advantageous and beneficial in connection therewith; the being deprived of which would render the use of the road or any part of it less convenient and valuable.

There is nothing in the residue of the description restricting this general language by the application of the maxim, that the expression of one excludes the other. It is insisted by the respondent that the use of this strip as a street, or otherwise, is not necessary for the use of the railroad. This is true, in the sense of being absolutely necessary, because the road has been and still is operated without it. But in the sense in which the word is construed in taking land for the use of roads, under the statute, against the will of the owner, it is necessary, because it appears that the road can be operated more conveniently and beneficially with than without such use. It was condemned in behalf of the New York Central Company for the reason that its use by that company was more essential to it and the public

Alexander v. Atlantic, &c. R. R. Co.

than to the present parties. The New York Central Company was compelled to pay not only the value of the land taken, but the damages caused thereby to the other lands of the owner. This, in the present case, was the injury to the depot, &c., by being deprived of the use of this strip. It is the lessee and not the lessor that suffers this loss during the term. Upon principles of equity, as well as upon the true construction of the lease, I think the referee and special term were right in holding that the appellant was entitled to the use of the money during the term of its lease, and that the general term erred in reversing the order of the former. The order of the general term must be reversed, and that of the special term affirmed.

All concur.

BY THE COURT.—Order reversed

**ALEXANDER v. THE ATLANTIC, TENNESSEE, &
OHIO RAILROAD COMPANY.**

67 *North Carolina*, 198.

Supreme Court of North Carolina; June Term, 1872.

Bonds. Scaling laws. The ordinance of the convention of North Carolina of 1865,—that all executory contracts, solvable in money, made between certain dates, shall be deemed to have been made with the understanding that they were solvable in money of the value of Confederate currency, according to a scale to be fixed by the legislature, subject to evidence of a different intent by the parties,—applies to bonds for the payment of money executed by a railway company within the dates specified. And a different intent

Alexander v. Atlantic, &c. R. R. Co.

cannot be implied, in the absence of all other evidence, merely from a provision of the charter of the company that its bonds shall be paid to contractors for building the road only at par value.

Appeal to the supreme court of North Carolina from the special term of the superior court of Mecklenburg county.

This was an action on certain bonds and coupons issued by the defendant in April and May, 1862, payable at its office in Charlotte or Statesville, N. C.

The evidence showed that the rails of the defendant's road had been taken up by the Confederate authorities in 1863, and that the company had no office in Charlotte or Statesville from that time until 1870. The president of the corporation testified that from 1864 to 1869 the company's books were kept at Columbia, S. C.; that he was the financial agent of the corporation, and kept his office at Charlotte, N. C.; that after the reconstruction of the road, which commenced in 1869, the treasurer's office was in Statesville, N. C.

The judge charged the jury that if the defendant had no office either in Statesville or Charlotte at the time of the demand which was alleged in the complaint to have been made of the company, but at no specified place, the demand was sufficient; and that the scale of depreciation established by the legislature did not apply to the bonds or coupons.

Verdict was rendered for plaintiff. A motion for new trial was overruled, and judgment entered; and from the judgment defendant appealed.

Jones & Johnston, for plaintiff.

Wilson & Barringer, for defendant.

Alexander v. Atlantic, &c. R. R. Co.

READE, J.—The case presents two points :

1. Whether there was a sufficient demand, before action brought ?

2. Whether the bond and coupons are subject to the legislative scale ?

1. The bonds on their face were to be presented at the office of the defendant in Charlotte or Statesville. They were not so presented, because, as was alleged, the defendant had no offices at those places at the time of their maturity, and so they were presented to the defendant elsewhere, and payment demanded.

His Honor instructed the jury, that, if the defendant had no offices at the places named, then the demand made at their office in Columbia, S. C., was sufficient. We think the instruction was right, even upon the supposition that a demand was necessary.

2. The ordinance of the convention, October, 1865, provides that all executory contracts, solvable in money, made between certain dates, including the date of these bonds, shall be deemed to have been made with the understanding that they were solvable in money of the value of Confederate currency, according to a scale which the legislature should fix, subject to evidence of a different intent of the parties.

Here was a contract solvable in money, and deemed to be solvable in confederate currency. Was there any evidence that the parties intended otherwise, so as to take this case out of the presumption made by the ordinance ? It is not pretended that there was any such intent *expressed* by the parties, but it is insisted that such intent is to be *implied*—that the bonds express upon their face that they are issued in “conformity to the charter,” and that the charter forbids the bonds of the company “to be used at a discount below their par value,” and, therefore, it is to be implied, that when the company issued these bonds it got par value for them ; and that when the company comes to pay the

Alexander v. Atlantic, &c. R. R. Co.

bonds, it must pay par value, *i. e.*, the nominal amount. But this seems not to be true in fact. The charter (§ 41) provides that the company may make contracts for building the road, and may pay the contractors in bonds at par value, *i. e.*, may pay a hundred dollar debt with a hundred dollar bond; but then, the debt may have been contracted with a view to the depreciation of the bond with which payment was to be made, so that a hundred dollar contract in *name* may have been only a fifty dollar, or a ten dollar contract, in *value*. And, in such a case, a hundred dollar bond issued at par in name, in payment of such contract, would really be issued for the value of fifty dollars or ten dollars. So that, in view of the history of the time when these bonds were issued, of which we take notice, it is rather to be implied, if indeed it be not to be taken as certain, that the bonds, although issued at par in name, were really issued at very great discount. Especially is this to be taken to be so, inasmuch as the plaintiff has not shown for what these bonds were issued, or what consideration was actually paid for them.

It would have been competent for the plaintiff to show that these bonds were given in payment for labor, or for materials, and to show the value of the labor or materials. But he has shown nothing to relieve the case from the presumption that the bonds are solvable in money of the value of confederate currency at the time they were issued.

And then it is insisted that if it appears, either expressly or by implication or by presumption, that the bonds were issued for less than par, then the company acted *ultra vires*, and the bonds are void.

It would do the plaintiff no good to maintain this, for thereby he would lose his debt altogether; and the defendant has made no such objection. The plaintiff's counsel did insist, that no such presumption attached

Alexander v. Atlantic, &c. R. R. Co.

to the bonds ; because the company had the power to issue bonds with such a quality. But still, he insisted, that if the bonds have that quality, yet, the company cannot take advantage of its own wrong, and repudiate them. The argument is a dangerous one for the plaintiff, because the authorities are, that if the company had no *power* to issue the bonds, they are void ; but if they had power to issue them, and there was only some *irregularity* connected with them, the company shall not take advantage of such irregularity. Here then, the plaintiff says, the company had power to issue the bonds, and is liable for their *full* value ; the company admits its power to issue the bonds, but insists, that it is liable only for their real value. Both parties, therefore, admit the *power* to issue the bonds just as they are, and their *construction* only is before the court. The charter authorizes the issue of the bonds, at their par, or full value, in payment for building the road ; and allows them to be converted into stock, dollar for dollar, or redeemed with money ; and then the statute says, that shall be deemed to be money of the value of confederate treasury notes, nothing else appearing. The bonds themselves stipulate, that they may be converted into stock at their par value, by the holder. The holder, the plaintiff, has chosen not to convert them into stock, but to sue for their money value ; which, in the absence of proof to the contrary, the statute fixes to be money of the value of confederate notes.

There is error.

BY THE COURT.—*Venire de novo.*

Monadnock R. R. v. Felt.

THE MONADNOCK RAILROAD v. FELT.

53 New Hampshire, 379.

*Supreme Court of New Hampshire · December Term,
1872.*

Subscription for stock in railroad company. Subscriptions for shares in the M. railroad, a corporation chartered by the state of New Hampshire, were received in a book which contained the condition that the subscribers should not be liable for payment of their subscriptions until a specified number of shares should be taken. A corporation was subsequently chartered by the state of Massachusetts, under the same name, with power to unite with the M. Railroad in New Hampshire; and the town of W. in Massachusetts was empowered to subscribe for a certain amount of stock in the Massachusetts corporation, and did so subscribe. Afterwards the two corporations united, forming one line from P., in New Hampshire, to W., in Massachusetts, and from that time they were operated as one. Without including the subscriptions of the town of W., the number of shares of stock in the M. Railroad required by the subscription book to be taken before the subscribers became liable to pay, were not taken. In an action by the corporation against one of the subscribers,—*Held*, that, inasmuch as the Massachusetts corporation was not in existence at the time of the subscription, there was no latent ambiguity in the contract as to what was meant by the M. Railroad, and parol evidence was therefore not admissible to show that the parties understood and intended by it the united enterprise of a railroad from P. to W.: hence, that the condition upon which the subscription was made had not been performed, and the defendant was not liable to pay for the shares.

Appeal to the supreme court of New Hampshire.

This was an action of assumpsit by the Monadnock Railroad against Granville P. Felt for calls on twenty shares of the capital stock of that company alleged to have been taken by the defendant. On trial upon the

Monadnock R. R. v. Felt.

general issue, the plaintiffs claimed a balance due on the calls of eight hundred dollars and interest,—the stock having been sold by the corporation for the sum of one thousand two hundred dollars for non-payment of the calls. The claim of the plaintiffs was founded upon the subscription of the defendant for twenty shares of the stock, made July 3, 1868. At that time the corporation was not organized, although it was previously chartered. It was, in fact, organized in October, 1868, and went into operation. The book subscribed by the defendant was prepared at a meeting of citizens of Peterborough and other towns friendly to this railroad enterprise, and holden July 3, 1868; and the terms of the subscription were as follows:

“We, the undersigned, agree to take the number of shares of stock in the Monadnock Railroad set against our respective names, said shares to be rated at one hundred dollars each, upon the express condition that we shall not become liable for the payment of any part of the same until two thousand shares of said stock shall be taken in cash or its equivalent, *bona fide*, in addition to the gratuities of five per cent. of their respective valuations voted by the towns on the line of the road.”

The plaintiffs claimed, and offered evidence tending to prove, that about two thousand one hundred and fifty shares had been subscribed in the stock of the Monadnock Railroad; but this included three hundred shares subscribed by the town of Winchendon, in Massachusetts: and it was objected that no authority to subscribe for stock in this railroad was shown, and therefore this stock could not be counted. It appearing, however, that the stock had been paid by the town, in the assessments called for by vote of the directors, the court ruled this was a ratification of the authority of the committee who made the subscription; and the defendant excepted. At the time defendant's

Monadnock R. R. v. Felt.

subscription was made (July 3, 1868), the Monadnock Railroad in New Hampshire had been chartered but not organized. In May, 1869, the Monadnock Railroad in Massachusetts was chartered by the legislature of that state, with the power to unite with the New Hampshire corporation, so that the stockholders of one should be the stockholders of both corporations; and the town of Winchendon were empowered by special act of that legislature to subscribe a certain amount to the stock of the Massachusetts corporation, but had no authority to subscribe for the other. In the charter of the Monadnock Railroad in New Hampshire, passed December 13, 1848, it was provided that this railroad might "intersect and unite with any railroad corporation on the line of the state that the legislature of Massachusetts may charter, connecting with said Cheshire Railroad." The capital stock of the New Hampshire corporation was fixed in the charter at three thousand shares, and of the Massachusetts corporation at fifty thousand dollars. A union was effected between the two corporations, July 7, 1869, and they have since been operated as one, and under one set of officers; and a railroad has been built from Peterborough to Winchendon, intersecting with the Cheshire Railroad at that place, two miles and two hundred feet of the road being in Massachusetts, and fourteen miles less two hundred feet being in New Hampshire. The Winchendon subscription was upon a book or paper other than the one signed by the defendant, but was substantially on the same terms for stock,—three hundred shares in the Monadnock Railroad,—without further designation, with some conditions as to the place of termination in Winchendon. It was dated October 19, 1868, and subscribed by Winchendon and two others,—in all, one thousand shares; but it appeared that the subscriptions were in fact not made until about June, 1869. The evidence

Monadnock R. R. v. Felt.

tended very strongly to show the Winchendon subscription was made under the power given by the Massachusetts act to subscribe for stock in the corporation there, and was for that corporation; and without that subscription it was clear that the two thousand shares mentioned in the book subscribed by the defendant had not been taken. It appeared that this stock was assessed with the rest by the directors of the united corporations, and the assessments paid to their treasurer,—the assessments commencing in September, 1869,—and nearly fifty thousand dollars expended on the Massachusetts part of the road. The defendant contended that no assessments could legally be made until the three thousand shares fixed by the charter had been taken,—notwithstanding by the subscription the condition was two thousand shares,—and also contended that if the two thousand was to govern, yet, as the capital of the Massachusetts corporation was fixed at fifty thousand dollars, there must be taken stock at least to the amount of two hundred and fifty thousand dollars, before assessments could be made. But the court overruled both of these objections, and the defendant excepted. It appeared that the corporation, on October 20, 1868, by vote at a meeting of the corporation, reduced the capital stock to two hundred thousand dollars.

The court instructed the jury, that, if the Winchendon subscription was for the Monadnock Railroad in Massachusetts, and not for the Monadnock Railroad mentioned in the defendant's subscription, it could not be counted towards the two thousand shares; but, for the purpose of settling all the questions of fact that might arise in these cases, they might inquire whether, in using the terms "two thousand shares in said stock" in the defendant's subscription, so many shares in the united enterprise of a railroad from Peterborough to Winchendon were contemplated by the parties, and if

Monadnock R. R. v. Felt.

they found it so, they might count the Winchendon subscription if they found it made for the united enterprise ; and to these instructions the defendant excepted.

The jury returned a verdict for the plaintiffs, and the defendant moves to set it aside.

Smith, Scott, and B. Wadleigh, for the defendant.

Parks, and Wheeler & Faulkner, for the plaintiffs.

LADD, J.—The contract of subscription, upon which the plaintiffs seek to recover, is in writing, and its construction and interpretation are for the court.

It is not claimed that the instrument contains any unusual, technical, or official words, the meaning of which, as used, must be submitted to the jury ; but it is said that it presents a latent ambiguity, which renders parol evidence admissible to show what the parties intended by the words "Monadnock Railroad."

If any ambiguity exists, it is obvious that it is a latent ambiguity in the strictest sense of that term, for no uncertainty or doubt appears upon the face of the instrument itself. The subscription was for twenty shares of stock in the Monadnock Railroad ; and the condition upon which the defendant was to be liable to pay for it is express and plain,—that two thousand shares of "said stock" shall be taken in cash or its equivalent, before his liability to pay should attach.

The familiar examples of latent ambiguity given by Lord BACON, *Reg. 23*, and in Altham's case, 8 Co. 155, a, show a double application of words of description to persons and things,—the subjects of the contract or devise. In such cases, and such only, extrinsic evidence of intention is admissible to remove the uncertainty. It may be shown which of two or more persons or things was intended by a description equally applicable to all. 1 *Pars. on Cont.* 560 ; *Brown v. Brown*, 43 N. H. 17.

Monadnock R. R. v. Felt.

If, at the time this contract was entered into, there had been two or more Monadnock Railroads, it is plain enough the plaintiffs might show, by parol, which was intended. But the difficulty with this part of the plaintiffs' case is, that there was but one. The case shows that the only Monadnock Railroad in existence at the time of the subscription, July 3, 1868, was that chartered by the legislature of New Hampshire in 1848. The Massachusetts corporation of that name was not chartered till ten months later, that is, in May, 1869; and the present Monadnock Railroad, which seems to be constituted by a union of the New Hampshire and Massachusetts corporations, did not come into existence until more than a year after, namely, July 7, 1869. How can it be argued, then, that there is uncertainty or doubt as to which Monadnock Railroad was meant, when there was but one of that name at the time of the contract?

This is conclusive against showing the intention of the parties, in that respect, by parol. It comes clearly within the principle of Lord BACON'S reason for holding that a patent ambiguity is not holpen by averment, namely, "that it were to make all deeds hollow and subject to averments, and so, in effect, that to pass without deed, which the law appointeth shall not pass but by deed." It would, to all practical intents, annul the writing which the parties established as the evidence of their intention at the time, and allow to be substituted for it whatever a jury may think was intended long afterwards, when perhaps the interests of the parties, as well as their relations to the subject matter of the contract, may have wholly changed, and when evidence on which one or the other might rely to show the actual fact in that respect has gone beyond his reach by the lapse of time. This the law does not permit. It was to prevent just this mischief that the wholesome rule, that a patent ambiguity cannot be explained by

Monadnock R. R. v. Felt.

parol evidence, beyond proof of the surrounding circumstances, was adopted. *Webster v. Atkinson*, 4 *N. H.* 21; *Aldrich v. Jessimin*, 8 *N. H.* 516; and see a very accurate and useful decision of the whole matter, in *Miller v. Travers*, 8 *Bing.* 244.

The maxim "*Falsa demonstratio non nocet*," &c., presents no exception; for, after rejecting so much of the description as is false, in order that the instrument may take effect, there must still be enough left to show the intent, and ascertain its application. *Peaslee v. Gee*, 19 *N. H.* 273; *Andrews v. Todd*, 50 *Id.* 565; *Doe v. Hubbard*, 15 *Q. B.* 240.

An intention not clearly shown by what remains cannot be imported into the instrument by extrinsic evidence.

In giving construction to a written contract, courts always receive such evidence of the surrounding circumstances as will place them as near as may be in the position of the parties at the time it was made.

In *Lady Herdley's Case*—*Shore v. Wilson*, 9 *Cz. & Fin.* 556—the great question was as to what was the sense in which the words "godly preachers of Christ's holy gospel" were to be understood in the deed creating the trust. To show this, extrinsic evidence was received; and Baron PARKE, in delivering his judgment, said, "For the purpose of applying the instrument to the facts, and determining what passes by it, and who take an interest under it, every material fact that will enable the court to identify the person or thing mentioned in the instrument, and to place the court,—whose province it is to declare the meaning of the words of the instrument as near as may be in the situation of the parties,—is admissible in evidence."

In *Attorney General v. Clapham*, 4 *De G. McN. & G.*, 628, Lord Chancellor CRANWORTH, speaking of the admission of evidence for such a purpose, says, "It is like the evidence afforded by a dictionary, which

Monadnock R. R. v. Felt.

enables us to translate a foreign language,—or a book of science, which gives us the meaning of words of art.”

The illustration of Sir JAMES WIGRAM is also extremely clear. He says, “A page of history may not be intelligible till some collateral extrinsic circumstances are known to the reader. No one, however, would imagine that he was acquiring a knowledge of the writer’s meaning from any other source than the page he was reading, because, in order to make that page intelligible, he required to be informed to what country the writer belonged, or to be furnished with a map of the country about which he was reading.” *Wigram on Wills*, § 76.

Nothing remains but to make a correct application of these well settled and familiar principles to the case before us.

Enough has already been said as to any latent ambiguity within the meaning of Lord BACON’s rule. The evidence shows none, because there was but one Monadnock Railroad in existence at the time of the subscription.

But looking at the contract by the light of the circumstances under which it was made,—that is, assuming as far as possible the position of the parties to it at that time, can it be said that it speaks a doubtful language? Does the paper thus viewed show for itself that the words “Monadnock Railroad” mean some other legal person than the only Monadnock Railroad then in existence, or leave it doubtful what was intended? We think not. If the contract had been read before the Massachusetts corporation was chartered, and before the two corporations were united, it is plain nothing could have been found in it to suggest a doubt as to what was meant by Monadnock Railroad. To show then, by parol, that the parties understood and intended something else, would be to annul the written contract and substitute for it a verbal one, or one per-

Monadnock R. R. v. Felt.

haps only to be inferred by the jury from the acts and conduct of the parties.

The objection of the defendant's counsel that the subscription of the town of Winchendon in Massachusetts must be regarded as a subscription for stock in the Massachusetts corporation, according to the act conferring the authority to subscribe, and as the evidence tended strongly to show the fact was, and that therefore it could not be counted in making up the two thousand shares, would appear to be quite formidable, and very likely on examination might prove to be decisive of the case. But the views expressed above make it unnecessary, we think, to consider this question, or others that might be raised upon the case, some of which, not alluded to in the arguments, might be of no small importance and difficulty.

For the purpose of settling all the questions of fact that might arise in this case, and a large number more supposed to involve nearly the same questions of law now pending in this county, the court instructed the jury that they might inquire whether, in using the terms "two thousand shares of said stock" in the defendant's subscription, so many shares in the united enterprise of a railroad from Peterborough to Winchendon were contemplated by the parties, and if they so found, they might count the Winchendon subscription if they found it made for the united enterprise. These *pro forma* instructions either assume that there was a latent ambiguity in the written contract of subscription as to what was meant by the Monadnock Railroad, which, we think, did not exist, or they are founded on a view of the law which we think erroneous. In either view they cannot be sustained.

Upon a careful examination of the case we are of opinion that there was nothing that should have been submitted to the jury.

The contract must be interpreted by the light of the

Melvin v. Hoitt.

circumstances which existed at the time it was made, and not of those which arose afterwards.

Looking at it from that point, we see nothing which requires explanation. The two thousand shares spoken of in the condition are described as "shares of said stock," that is, shares of the stock of the Monadnock Railroad.

The plaintiffs failed to show that two thousand shares of stock in the only Monadnock Railroad to which the contract can be legally applied had been taken at the time of the calls; and unless they do so it is clear the condition is not fulfilled, and the defendant's liability to pay has not attached.

BY THE COURT.—Verdict set aside.

MELVIN v. HOITT

53 *New Hampshire*, 61.

Supreme Court of New Hampshire; June Term, 1872.

Subscription to stock in railway corporation. A subscription for shares in the stock of a railway corporation is a contract to which the subscriber and the corporation are parties, and the assent of both is essential to the contract.

The signing of subscriptions at the request of individual directors, upon terms and conditions different from and not consistent with the basis of subscription adopted by the corporation, does not constitute a valid contract between the signers and the corporation; and they cannot be considered members, and have no right to vote as such at the meetings of the corporation.

But subscriptions made upon terms and conditions different from

Melvin v. Hoitt.

those proposed by the railroad company may be acquiesced in by the corporation, and the subscribers accepted as members. The authority of a railroad corporation to locate its road, as affected by various special acts in amendment of its charter, and by the general statutes of New Hampshire, considered.

Petition for a writ of mandamus. The facts are stated in the opinion of the court.

Morrison, Stanley & Hiland, Bartlett, and Hatch,
for the petitioners.

A. F. Stevens, and Wm. Barrett, for the defendants.

LADD, J.—This is a petition for a writ of mandamus, brought by Thomas J. Melvin and ten others against Alfred Hoitt and fourteen others, whereby the plaintiffs seek to recover from the defendants possession of the records, record books, subscription books, treasurer's records and receipts, and all plans and profiles of survey belonging to the Nashua & Rochester Railroad, and now in the hands of the defendants.

The ground upon which the plaintiffs' claim is based is, that they were duly and legally elected a board of directors of said corporation, at its last annual meeting, held May 7, 1872.

The defendants resist this demand, and claim the right to retain possession of said documents on the ground that they, and not the plaintiffs, were duly and legally elected a board of directors of said corporation at said meeting.

A very large amount of testimony has been taken and laid before us.

The following facts, however, are all we deem it material to state for the proper understanding of our decision :

At a meeting of the grantees of the Nashua & Epping Railroad Company, held at Sanders's hotel, in Derry, on Tuesday, August 11, 1868, the grantees unanimously voted to accept of the act of the New

Malvin v. Hoitt.

Hampshire legislature of June 24, 1868, uniting the Nashua & Epping Railroad Company with the Portland & Rochester Railroad Company. At this meeting the following resolutions were adopted :

1. *Resolved*, That the several routes, for the purposes hereinafter provided, be respectively designated as follows, viz. : From Nashua to Derry depot by way of Hills Row and the Hudson poor-farm, as the Hills Row route ; from Nashua to Derry depot by the way of the middle of Hudson, as the Hudson route ; from Derry depot through Chester, Raymond, Nottingham, &c., to Rochester, as the Northern route ; from the Mammoth road at West Windham, by way of West Hampstead, Sandown, Epping, Lee, &c., to the intersection with the northern line, as the Southern route.

2. *Resolved*, That books be opened for subscriptions to the capital stock of the Nashua & Rochester Railroad upon these several respective routes, and at such other points as subscriptions can be obtained.

3. *Resolved*, That if those who subscribe to such capital so desire, they may designate the route which they prefer.

4. *Resolved*, That whenever such an amount of stock is subscribed as that the present board of managers of the Nashua & Epping Railroad Company shall judge it desirable to organize as stockholders of the corporation of the Nashua & Rochester Railroad, and to locate the road, it shall be the duty of said managers to call a meeting of all the subscribers to stock, and all other parties, if any, actually furnishing capital to construct the road. At the meeting so called, all subscribers to stock or capital shall have a right to cast one vote for each one hundred dollars subscribed, whether the question be upon the election of officers or the location of the road.

5. *Resolved*, That when the road is located, either by officers so elected, or the subscribers to the capital

Melvin v. Hoitt.

so voting, such subscribers to capital as have signified their preference for either route, if such route shall not have been adopted, may be released from their subscriptions by giving notice to the treasurer, within thirty days from the time of such location, that they desire such release.

Voted, That the board of managers of the Nashua & Epping Railroad Company be authorized to act as a board of managers of this corporation, and that they be authorized to carry into effect the resolutions of this meeting.

At a meeting of the board of managers of the Nashua & Rochester Railroad, August 15, 1868, it was *Voted*, To adopt the form of the copy presented by George Y. Sawyer, and have printed twenty books for subscription to stock. *Voted*, That a committee of five be appointed to take charge of the subscription books for stock, and to make suitable and proper arrangements for presenting them to the public for subscriptions, and for procuring subscriptions to the stock of the corporation. *Voted*, That Messrs. Greeley, Melvin, Currier, Parkinson, and Robinson be that committee.

In the form of subscription thus adopted is the following provision: "Subject, however, to the right of withdrawing those subscriptions in which a preferred route is indicated, by notice, in writing, to the treasurer of the corporation within thirty days after the railroad is located, under the authority of the stockholders, in case such location is not upon the route indicated in the subscription as the preferred route."

Books for subscription were opened containing this condition, and signed by the managers

At a meeting of the subscribers to stock in the Nashua & Rochester Railroad, in pursuance of a call by the managers, held September 1, 1869, a board of nine directors was chosen. On the same day the following vote was passed by the managers: *Voted*

Melvin v. Hoitt.

That the corporation, having completed their organization by a choice of directors by the subscribers to stock, at a meeting called by the managers for that purpose, therefore, all the powers and franchises of the corporation under the act of incorporation, and the various statutes passed in reference thereto, be transferred to said subscribers and the board of directors so chosen by them; and the organization of the grantees and board of managers is thereby dissolved.

We do not understand it to be in dispute, but that, from and after that date, the subscribers to stock in the Nashua & Rochester Railroad constituted the corporation, with full power to do all such things as corporations aggregate of the same character may do by the laws of this state.

They did in fact elect directors and a clerk, adopt by-laws, accept various acts of the legislature of New Hampshire, authorize their directors, in pursuance of an act of the legislature, to lease or make such other contract for the use and occupation of their road with any other railroad corporation, upon such terms and for such time as might be deemed expedient and for their best interests. The records show that from September 1, 1869, down to the annual meeting held May 7, 1872, they were a corporation *de facto*, and in the full exercise of all their corporate functions.

Indeed, it is alleged in the petition, and substantially admitted in the answer, that upon the transfer of the franchises of the corporation by the board of managers to the subscribers to stock, the subscribers thereby became and were the sole members of the corporation, and, in their associated capacity, constituted and were duly organized by the election of a clerk and a board of directors. Before this transfer, subscriptions had been made in the books, signed and issued by the managers as aforesaid, and subscribers had therein indicated their preference as to the route; and such sub-

Melvin C. Hott.

scribers were and all along have been recognized and treated as members of the corporation, and have voted at the meetings. These books have never been closed or withdrawn by any formal act of the corporation or the directors ; and it may be assumed that subscriptions were made on some of them after the transfer of the franchise to the subscribers, which have been recognized and treated as valid by the corporation.

Since the transfer, a large proportion of the subscriptions have been upon a form known as the subscription of 1871, adopted by the corporation, which contains a condition that, before any assessment is made, the road shall be leased to the Worcester & Nashua Railroad Company for a term of not less than twenty years, at a rent amounting to six per cent. per year (payable semi-annually) on the cost of said Nashua & Rochester Railroad Company. And quite an amount of subscriptions on different books is upon further conditions, annexed by the individual subscribers. For example: several towns make the condition that the railroad shall pass through their towns ; and the Worcester & Nashua Railroad make the condition that the location shall be established on the lower line, so called, as surveyed by C. O. Davis ; others, that nothing shall be payable by way of assessments until one million dollars shall have been subscribed, &c.

The records show that a special meeting of the corporation was duly called, to be held on April 5, 1872, to act upon the location of the railroad from Nashua to Rochester. And the books of the corporation contain the following entry of the doings of the meeting, held in pursuance of that call :

Col. Charles H. Waters introduced the following resolution, and moved its adoption :

Resolved, That the directors of the Nashua & Rochester Railroad be and they are hereby authorized and directed to locate the route of said railroad from

Melvin v. Heitt.

some point in the city of Nashua, where it shall connect with the Worcester & Nashua Railroad, to a point in the town of Rochester, where it shall connect with the Portland & Rochester Railroad,—said route passing through the towns of Hudson, Windham, Derry, Hampstead, Sandown, Fremont, Epping, Lee, and Barrington, being upon the lower route so called, substantially as surveyed by C. O. Davis, civil engineer—upon the condition, however, that, before said location shall be made, the contract and lease heretofore executed between said corporation and the Worcester & Nashua Railroad Company, for the operation of said Nashua & Rochester Railroad, shall be modified and changed by the insertion of the following proviso: And it is further agreed by the said Worcester & Nashua Railroad Company, that all loss and depreciation occurring or accruing to said Nashua & Rochester Railroad from the sale of its bonds, notes, or capital stock, made or issued to construct, complete, improve, repair, or make additions to said railroad, under the provisions of said lease, shall be added to and included in the cost of construction, upon which the interest of six per cent. per year is by the terms of said lease to be paid, provided the stock or securities so issued shall be negotiated by the Worcester & Nashua Railroad Company, if they so elect.

Hon. Thomas J. Melvin, of Chester, moved to amend the resolution offered by Col. Waters, by striking out all after the word resolved, and inserting the following:

Resolved, That all action with reference to the location of the Nashua & Rochester Railroad be postponed until such time as full and accurate surveys can be made of the several routes contemplated, and profiles and estimates of the cost of construction of said several routes completed, so that the subscribers to the capital stock of said company can act fairly and understandingly.

Melvin v. Hoitt.

Resolved, That, when the surveys of said several routes, profiles, and estimates have been made and completed, the president of the corporation be instructed to call a meeting of the subscribers to the capital stock of the said corporation at the city hall, in Nashua, by publishing a notice in the Nashua *Telegraph*, agreeably to the provisions of the by-laws of said company, and by printed notices to be sent by mail to each of said subscribers.

After discussion of the subject, the question was put upon the adoption of the amendment proposed by Mr. Melvin, and it was decided in the negative, and the amendment was rejected.

The question then recurred upon the adoption of the original resolution as proposed by Col. Waters, and, being put, it was decided in the affirmative, and it was adopted unanimously. The answer, however, alleges, and the proof shows, that during the progress of this meeting an injunction was served restraining the corporation, its officers, &c., from locating the road. The record is, therefore, of no consequence, except as it tends to show, in connection with the other evidence in the case, that a large majority of those who had subscribed for stock at that time were in favor of the lower or southern route; and that efforts were being made by those in favor of the northern or Hills Row route to prevent the location on the line preferred by the majority. About two or three weeks after the meeting of April 5—that is, about one or two weeks before the annual meeting of the corporation, which took place May 7, 1872—a subscription book was drawn up, spoken of by the witnesses as the “Mellen book.” All the facts in relation to this book do not appear so fully perhaps as might be desirable. It does appear, however, that it was procured to be made by Mr. Scripture, one of the directors, and that perhaps one or two others of the directors were cognizant of it at the time, and

Melvin A. Holtt.

countenanced its issue, although that is not made very clear by the evidence. But it was never authorized or directed by the corporation, or by the directors as a board, and but four or five at most out of the fifteen directors appear to have known of its existence until it was produced at the annual meeting of May 7.

The substance of this subscription does not differ materially from that authorized and signed by the managers in the books issued under the resolution of August 11, 1868, except that it contains a provision that interest shall be allowed on each assessment from the time of its payment until the road is completed, at the rate of 6 per cent. per annum, which is taken substantially from the conditional subscription of 1871. The wording of the document is wholly different throughout from the managers' subscription.

This Mellen book, a few days—perhaps a week or two—before the annual meeting, came to the hands of Col. George W. Lane, an active and zealous friend of the northern route, but not a director of the corporation, who, between that time and the day of the meeting, signed it himself for one thousand shares, and procured subscriptions from six other persons, amounting in the whole to seven thousand five hundred shares, all signifying their preference for the Hills Row or northern route. These subscriptions were not made known to the officers of the corporation having charge of the books, and were not entered upon the records of the corporation; but the subscribers appeared at the annual meeting and claimed the right to vote upon them, and did in fact cast ballots representing seven thousand five hundred shares of stock for directors. If these ballots had been received and counted, the plaintiffs would have been elected directors. They were rejected, and a very large majority of the remaining votes being for the defendants, the record shows that they were declared elected. The vote, as reported

Melvin S. Hoitt.

to the meeting by the committee appointed to assort and count it, stood for the plaintiffs one thousand four hundred and sixty-four, and for all the defendants, except Hoitt, Kinnicutt, and Turner, six thousand six hundred and eighty-five. Hoitt had eight thousand one hundred and forty-nine; Kinnicutt and Turner, eight thousand one hundred and fifty-nine each. If the votes cast upon the Mellen subscription had been counted, the plaintiffs would have received eight thousand nine hundred and sixty-four each.

At the time of the meeting of April 5, 1872, there had been made known to the treasurer of the corporation, and entered upon his books, subscriptions for eight thousand eight hundred and twenty shares. Four other subscription books, previously issued by authority of the corporation, were presented, containing one thousand nine hundred and four shares,—namely, the books of the towns of Chester, Derry, Deerfield, and Nottingham. Some of these subscriptions were made before and some after April 5; but the evidence does not show how much before and how much after. By an act of the legislature, passed at the June session, 1871, the capital stock of the Nashua & Rochester Railroad was limited to fifteen thousand shares, and authority was given to the president and directors, for the time being, to fix the amount from time to time. The evidence, therefore, makes it quite certain that the Mellen subscription, at the time it was procured, increased the capital stock one thousand five hundred shares above the amount limited by the legislature, and leaves it very probable, to say the least, that it made the excess one thousand shares more than that,—that is, two thousand five hundred shares in all. It is claimed by the defendants that the directors, on May 5, 1872, in pursuance of the authority given them by the act of June 30, 1871, limited the stock to ten thousand shares.

Melvin v. Hoitt.

It is alleged in an amendment to the petition that they did at that time undertake and pretend to limit the capital stock of said corporation to ten thousand shares of one hundred dollars each, or one million dollars; and it is averred that such pretended limitation was not made in good faith, but was made for the corrupt and fraudulent purpose of excluding further subscriptions, authorized, &c., and keeping the control and location of said railroad within their own power. The fact of limitation is also alleged in the answer, the fraud being denied. The question thus presented is the good faith of the limitation. In the view we have taken of the case, we have not found it necessary to go into that question; and our decision does not rest at all upon any limitation of the capital stock by the directors.

Many other matters have been laid before us in the evidence, but this is enough to show the grounds upon which our judgment is based.

Upon these facts, it is claimed by the plaintiffs that the subscribers on the Mellen book were members of the corporation on May 7, 1872, and were entitled to vote for directors; that their votes were wrongfully and illegally rejected; and that the plaintiffs were by their votes legally elected directors of the corporation.

The question is, Were the subscribers on the Mellen book members of the corporation, May 7, 1872? We think they were not.

Chapter 133 of the General Statutes relates to the general powers of corporations, excepting only public municipal corporations. Section 3 provides that every such corporation may admit associates and members, and for just cause remove them. It need not be said that the power to admit associates and members beyond all question implies the power to reject or refuse admission to those who may seek to become members, at the will of the corporation.

The subscription is a contract to which the sub-

Melvin v. Hoitt.

scriber and the corporation are the parties (*Ang. & A. Corp.* § 517), and such contract cannot be consummated without the assent of both. *Lechmere Bank v. Boynton*; *Essex Turnpike Corp. v. Collins*, 8 *Mass.* 292; *Company v. Balch*, 8 *Gray*, 311; *Penobscot Boom Corp. v. Lamson*, 4 *Shep.* 224; *Day v. Stetson*, 8 *Greenl.* 365. The doctrine has been repeatedly recognized in this state;—see *Low v. Concord, &c. R. R.*, 45 *N. H.* 370; *Chesley v. Pierce*, 32 *N. H.* 402; *Hughes v. Parker*, 20 *N. H.* 58.

It is contended by the plaintiffs that the Mellen book was in effect the same as the managers' books issued August 15, 1868; that the terms of subscription offered by those books were adopted, ratified, and continued by the corporation when the franchise passed into the hands of the subscribers; that they were in force as a valid offer of terms upon which stock might be taken, when the Mellen subscriptions were made; and that, therefore, when those terms were accepted, a valid contract was completed with the subscribers, whereby not only the corporation became bound to admit them as members, but by force of which they actually became and were members.

It might, perhaps, be well enough objected to this that the Mellen book was not in fact one of the subscription books issued by the managers; and further, that the terms of the subscription being different in at least one somewhat essential particular, the contract sought to be enforced is one which was never offered or assented to by the managers on behalf of the corporation. But we are inclined to put our decision on broader ground. It is very manifest from the evidence that the managers' subscription of 1868 had been substantially abandoned. It must have been well known to Col. Scripture, as well as to all the directors and others actively interested in advancing the enterprise, that it was in contemplation to lease the road to the

Malvin e. Hoitt.

Worcester & Nashua Railroad, according to the authority granted for that purpose by the act of June 30, 1871. Indeed, at a meeting of the corporation held August 24, 1871, it was voted that, for the purpose of encouraging subscriptions to the capital stock of said railroad and insuring its early construction, the board of directors are hereby authorized to lease, &c., their road, upon such terms and for such time as may be deemed expedient, &c.

The evidence leaves no doubt but that a form of subscription was thereupon drawn up and circulated among the members, and approved by them, containing a condition that the road should be leased, &c.; that by sufficient authority *de facto*, derived from the corporation at that meeting, the papers known as the conditional subscription of 1871 were immediately afterwards printed and offered for signature; that a large amount of subscriptions which had been made upon the managers' books was transferred to this new subscription, and that thereafterwards very nearly all subscriptions, amounting in the aggregate to several thousand shares, were made upon this form.

Col. Scripture himself entered the new form in his book at Nashua, procured many of the former subscriptions to be transferred and entered under it, and thereafter obtained new subscriptions upon that condition instead of the old one.

We think all this sufficiently indicated the purpose of the corporation to adopt a new basis of subscription, entirely different from and inconsistent with that of the managers; and that after this no director, with knowledge of the new form the enterprise had assumed, would be at liberty to authorize or encourage subscriptions upon the old form, with a view to thwart the wishes and intention of the corporation thus clearly expressed. At all events, we have no doubt but that the corporation would have the legal right and power

Melvin v. Hoitt.

under these circumstances to refuse to receive as members those whose subscriptions for stock had been thus obtained. We think Col. Scripture, and the other individual directors (if there were any) acting in concert with him in procuring the Mellen book to be drawn up, had no legal power to bind the corporation to the contract of subscription offered by it; that when that book was signed by parties who promised to take and pay for stock upon the terms and conditions therein set down, no valid contract was thereby created between them and the corporation; that the corporation did not in and by said book agree to accept them as members; that, therefore, they were not members on the day of the annual meeting, and their votes were rightly rejected.

It is contended on the part of the petitioners that, setting aside the vote upon the Mellen subscriptions, they still had a majority of the legal votes cast for directors, on the ground that nearly all the votes against them were unauthorized and illegal.

Aside from the Mellen subscriptions, the plaintiffs received one thousand four hundred and sixty-four votes upon shares which were duly entered on the treasurer's books and treated by the corporation as legal.

An examination and analysis of all those votes would, doubtless, be a very tedious and difficult task; and we might, perhaps, content ourselves with saying simply that the evidence shows that the votes for the defendants were cast upon subscriptions which had all along been treated by the corporation as valid; had been acquiesced in by some at least of these plaintiffs, and never disputed or challenged by anybody, and were duly entered upon the treasurer's books as required by section 10 of chapter 134 of the General Statutes.

We have, however, examined some of the subscriptions upon which the votes for the defendants were cast and are entirely satisfied that, applying to

Melvin v. Hoitt.

them, where applicable, the same rules that must be adopted to save the votes cast for the plaintiffs, a large proportion—perhaps all of them—were properly received and counted,—certainly enough to overbalance the one thousand four hundred and sixty-four cast for the plaintiffs. To take a single instance, which may be sufficient to dispose of the case, we think this is true of the Nashua vote. The city of Nashua subscribed for two thousand shares in 1869, as shown by the joint resolution of the mayor and aldermen and common council of May 14, 1869. This subscription was upon the managers' book. Certain additional conditions were annexed by the city, as is true of the subscriptions of most towns: for example, that no assessment should be made until one million dollars was subscribed to the stock; that assessments should be made only so fast as the road is built, mile by mile, one forty-sixth part of the subscription to be payable on the completion of each mile; but these conditions were acquiesced in by the corporation, and the city was accepted as a member of the corporation.

On March 23, 1872, the conditions of the resolution of 1869 were rescinded, the rescission to take effect upon the execution of a lease of the road to the Worcester & Nashua Railroad, thus bringing their subscription to the terms of the conditional subscription of 1871. We are unable to perceive any objection to this. Undoubtedly the corporation might have declined the subscription upon the terms offered; but they did not do so. The subscription was accepted; was entered upon the treasurer's book; was represented and voted upon at the meetings without objection; and we think that the votes were properly received. No proof has been laid before us tending to show that the subscription made by the mayor on behalf of the city, in accordance with the resolution of the aldermen and common council, was unauthorized; and if such a claim is

Melvin v. Hoitt.

to be made by the petitioners, it is incumbent on them to show it.

But it is said, as we understand the position of the plaintiffs, that the subscription of Nashua being, as it now stands, upon condition of a lease to the Worcester & Nashua Railroad, it is subject to the further condition that the road shall be located on the southern route; that the southern route is without the limits of the charter; and that, therefore, the condition is illegal, and the subscription for that cause invalid. We have accordingly examined the question of the right of the Nashua & Rochester corporation to locate their road, that question having been argued by counsel, and submitted to our determination at this time.

All railroad corporations are declared by statute in this state to be public (*Gen. Stats.* ch. 146, § 2); and the roads themselves are public, and at all times subject to the control of the legislature. The mode in which they shall be located and laid out has always been regulated and established by the legislature.

By *Gen. Stats.* ch. 146, §§ 4, 5, and 6, the power to locate their road is conferred, in the first instance, upon the proprietors and their agents. There can be no doubt but that under this general provision the Nashua & Rochester corporation had authority, without the intervention of the railroad commissioners, to locate and lay out their road. Indeed, since the enactment of the general statutes there seems to have been no provision whereby the railroad commissioners could legally make a location in the first instance,—their powers in this respect being limited to cases where stockholders holding one-tenth of the capital stock are dissatisfied with the location made by the corporation (*Gen. Stat.* ch. 146, § 8), and where a change of the location is desired (*Id.* § 18).

The only question then is, whether there is anything in the charter of the Nashua & Rochester Railroad, as

Melvin v. Hoitt.

it now stands, amended by the great number of special acts in relation thereto passed since the original charter was granted to the Nashua & Epping Railroad in 1848, by which the location of the road is confined to any particular route, or to any particular intermediate point between Nashua and Rochester. We have carefully examined those various acts, which are of the following dates: December 29, 1848; June 30, 1853; July 2, 1853; July 2, 1866; July 5, 1867; June 24, 1868; June 30, 1871.

By the act of July 2, 1866, it was left for the railroad commissioners to lay out the Portland & Rochester Railroad from Rochester to Manchester, or to the Concord & Portsmouth Railroad, at any intermediate point on said railroad, thereby connecting with Manchester, without any other restrictions as to the route; and so far as that part of the route is concerned, there is no question, as we understand it, growing out of any act of the legislature affecting the corporate rights of that road, because we have no doubt but that any special provision as to a location by the commissioners must be regarded as repealed by the broad provision of the general statutes covering the subject.

The original charter of the Nashua & Epping Railroad confined the location to certain towns. But it is clear, we think, that the act of 1853, whereby it was provided that the Nashua & Epping Railroad might be constructed, between Nashua & Epping, through such towns as the railroad commissioners might determine, anything in the original act to the contrary notwithstanding, places this part of the route upon the same footing, as to all restrictions except Epping, with the other; that is, except as to Epping, the location is left to be fixed by the commissioners. But it appears to be sufficiently plain that the restriction as to Epping has been removed by the acts of the legislature, passed since that time. By act of July 5, 1867, the Portland

Melvin v. Holtt.

& Rochester and the Nashua & Epping railroads were authorized to unite ; and by act of June 24, 1868, those two corporations were united into one corporation by the name of the Nashua & Rochester Railroad. No agreement for the union was approved and filed under the provisions of the act of 1867. In that act, section 6, it was expressly provided that in case such agreement were approved and filed, "the said Nashua & Epping Railroad Company may construct their railroad from Nashua to the Portsmouth & Concord Railroad, or to such other point as may be necessary and convenient for forming a connection with said railroad of the Portland & Rochester Railroad Company, and constituting a continuous railroad route from Nashua to Rochester." This clearly abrogates all restrictions before that time existing as to the location of their road by the Nashua & Epping company, including, of course, the restriction as to the town of Epping. It is probably unnecessary, after all, to show this, as we understand the southern route passes through Epping.

The subsequent legislation shows that no forfeiture of the rights conferred by the acts referred to has taken place through a failure of the several corporations to perform the conditions imposed ; that is, the time within which it was provided that one hundred thousand dollars must be expended in construction has been extended by the legislature so that the rights have been preserved.

Our conclusion upon this part of the case therefore is, that so far as it may appear from any or all the special acts that the location was to be fixed by the railroad commissioners, the force and operation of those acts are arrested, and the acts themselves are in effect repealed, by the provisions of the General Statutes relating to the same subject ; and so far as the restrictions as to location, contained in the original charter of the Nashua & Epping Railroad, are concerned,

Burroughs v. North Carolina R. R. Co.

they are all repealed by the subsequent special legislation on the subject. So that the Nashua & Rochester Railroad, ever since the act of June 24, 1868, uniting the Nashua & Epping and the Portland & Rochester corporations, has had the legal right to locate its road according to the provisions of the General Statutes.

We think, therefore, that the subscription of the city of Nashua was not invalid for this reason, and that their vote was properly received. That vote was two thousand—sufficient to make a majority for the defendants.

The result is, that the petitioners fail to show that they were legally elected directors at the annual meeting of May 7, 1872, and the petition must be dismissed.

BY THE COURT.—Petition dismissed.

BURROUGHS v. THE NORTH CAROLINA RAILROAD COMPANY.

67 North Carolina, 376.

Supreme Court of North Carolina; June Term, 1872.

Sale of stock. Dividends. A sale and transfer of shares of stock in a railway company carries with it dividends upon such shares previously declared, but payable at a date subsequent to such sale and transfer.

Appeal to the supreme court of North Carolina from the special term of the superior court of Mecklenburgh county.

This was an action to recover the dividends upon certain shares of stock in the defendant corporation, in

Burroughs v. North Carolina R. R. Co.

which an agreed case was submitted to the court, as follows:

The plaintiffs, on February 16, 1870, were the owners of thirty-four shares of stock in the North Carolina Railroad Company, upon which a dividend of six per centum was declared on said February 16, 1870, three per centum payable on April 1, 1870, and three per centum on July 1, 1870. The plaintiffs sold and transferred said stock on February 17, 1870, to S. H. Wiley. The plaintiffs made due demand for payment of the dividends, before the date fixed for the payment. The payment was refused. The dividend was paid to S. H. Wiley, the assignee. The certificate of stock, issued to plaintiffs, was canceled, and a new one issued to Wiley, on February 21, 1870.

The following resolution was also made a part of the case agreed:

"The board of directors of the North Carolina Railroad Company do declare an annual dividend of six per cent. on the capital stock of this company, for the fiscal year ending May 31, 1870. Three per cent. to be paid on April 1, and three per cent. on July 1, 1870, and the transfer books be closed from March 1 to April 1, and from June 1 to July 1."

The court was of opinion that the plaintiffs were entitled to recover. Judgment was entered accordingly; from which judgment the defendant appealed.

Jones & Johnston, for the plaintiffs.

J. H. Wilson, for the defendant.

RODMAN, J.—On February, 16, 1870, the North Carolina Railroad Company declared a dividend by the following resolution: "The board of directors of the North Carolina Railroad Company do declare an annual dividend of six per cent. on the capital stock of this company, for the fiscal year ending May 31,

Burroughs v. North Carolina R. R. Co.

1870. Three per cent. to be paid on April 1, and three per cent. payable on July 1, 1870, and the transfer books be closed from March 1 to April 1, and from June 1 until July 1."

On February 17, the plaintiffs, in writing in the usual form, at the foot of their certificate for thirty-four shares of stock in the company, transferred the same to Samuel H. Wiley for value, and authorized F. A. Stagg, attorney, to transfer the same on the books of the company. The transfer was accordingly made on February 21. The certificate of stock to the plaintiffs was canceled, and a new certificate issued to Wiley. On the same day plaintiffs notified the company that they claimed the dividend declared on February 16. The company, nevertheless, paid the same to Wiley, and this action is brought to recover it. One would suppose that in a case which must be of frequent occurrence, there would be proved some established usage, or that some decided cases could be found fixing the rights of the parties. If there be any established usage, either general or special to this corporation, there has been no evidence of it offered in this case. And the learned counsel inform us that they have been able to find no authority whatever on it. The absence of authority is the more remarkable, as the rule as to a dividend following the stock or not, under the present circumstances, would seem to be of a general nature, not confined to sales, but covering the case of a life tenant with remainder, when the life tenant dies after the dividend is declared, and before it is payable, and the case of a will bequeathing stock when the testator dies under the like circumstances.

Before proceeding to the particular consideration of this case, it is necessary to observe:

1. It was clearly within the power of the seller and purchaser of the stock in this case, to have contracted

Burroughs v. North Carolina R. R. Co.

with respect to the dividend declared on the day before. But,

2. If we assume for the moment, that the effect of the resolution declaring the dividend, was to make it payable to whoever should appear by the books of the company to be the owner of the stock on the days on which it was payable, then, notwithstanding any different contract between the plaintiffs and their vendee, the company was justified in paying to the vendee, and the redress of the plaintiffs would be by an action against their vendee for money had and received.

It is important to notice that the question is, not as to the contract between plaintiffs and Wiley, but, to whom did the company agree to pay the dividend; for if the company agreed to pay to one who turned out to be Wiley, its liability cannot be affected by any collateral agreement between the plaintiffs and Wiley (even if there were express proofs of such) without its consent. Without adverting to the principle, that the contract between plaintiffs and Wiley must be supposed to have been made in reference to the resolution of the day before, as to which it does not appear that either party had any advantage in point of knowledge; yet, in the absence of a contrary agreement, the sale must necessarily have been of the subject matter with its rights and incidents at the date, or perhaps when the transfer should be completed.

So that the true question is, What was the effect and meaning of the resolution? Did it mean that the dividend should be payable to those who held the stock on February 15, or to those who should hold on April 1? If the resolution had been clear and explicit in either sense, I conceive there could be no room for a controversy. Being of uncertain meaning, the courts have to give it a certain one. But whatever shall be determined to be its meaning in law, that must be taken to be as plainly its meaning as if it had been expressly written so.

Burroughs v. North Carolina R. R. Co.

Now as to the meaning and effect of the resolution. In the absence of a plain reason and of direct authority, a lawyer has but one resource. He must refer to analogous cases, and endeavor to extract from them a principle broad enough to cover the case in hand. And he will be more or less successful, according to the number and closeness of the analogies he is able to adduce.

As to the analogies. It is a familiar maxim, that the incident passes with its principal.

If a bond not negotiable, and bearing interest, whether that interest be made payable with the principal at a certain time, or be made payable annually or at other certain times before the principal, be assigned, the assignee is entitled to receive, as an incident, all interest not paid before the assignment, whether the day for its payment has arrived or not. Of course this doctrine will not apply to bonds with interest coupons detachable.

The analogy is not close in this, because, if a payment of interest had become due and payable on February 16, and the bond was assigned on February 17, the assignment of the bond would have carried the interest previously payable; which, if the analogy were strictly followed, would lead us to hold that if the assignment of stock had been after April 1, it would have carried the dividend payable on that day, if not paid before the assignment,—a conclusion not necessary in this case, and as to which we express no opinion. If one assigns a bond or promissory note, secured by mortgage or other collateral, the benefit of the collateral passes as an incident.

I take it to be clear also, that if a registered government bond be assigned on the books of the treasury, any annual or semi-annual payment of interest, which becomes due and *payable* the next day, would be paid to the then holder. *Anson v. Towgood*, 1 *Jac. & W.* 637. In such case the dividend would, in substance,

Burroughs v. North Carolina R. R. Co.

have been declared before the assignment, viz : at the making of the bond, but payable afterwards. If a reversioner sell land, the purchaser becomes entitled to the rent which becomes payable the next day. So if a tenant for life dies, the remainder-man becomes entitled. So with fines and heriots. These analogies, and some others, are found stated in the argument of Sir SAMUEL ROMILLY, in *Paris v. Paris*, 10 *Ves.* 186. These are all the analogies which occur to me, that are indisputable; for if an analogy be disputable it has no value. They would not be conclusive if any could be brought on the other side. But the general principle is clear, that the incident follows the principal. What reason exists for making this an exception? The burden of the argument is put on the plaintiffs.

What arguments can be drawn from the terms of the resolution?

What was the object in declaring the transfer books of the company closed from March 1 to April 1?

If the dividend was intended to be payable to any one who was the holder on February 16, there could be no use in closing the books. In any case, upon a demand for payment, it would only be necessary to see, from the books, who was the holder on that day. But if the usage be to put the dividend on the books of the company to the credit of the holders on March 1, we can see a reason for closing the books, viz : to give time for the company to make out its accounts with its stockholders on that day. Suppose an assignment of stock between March 1 and April 1, would the company be bound to notice it, in reference to a dividend payable April 1? I think not.

The same rule which applies to the dividend payable April 1, applies to that payable July 1. If the first did not pass by the assignment, the second did not.

But the learned counsel were mistaken in supposing

Burroughs v. North Carolina R. R. Co.

the question entirely barren of authority. In such cases we are generally willing to confide in the diligence of counsel, and do not feel ourselves bound to assiduous research. I have found one decided case, however, which, if correctly cited, is in point and decisive of this case. I cite it from *Lindley on Partnership*, 896, as follows: "The specific legatee (of stock) is entitled to all dividends which *become payable* after the death of the testator (*Jacques v. Chambers*, 2 *Coll.* 435; *Wright v. Warren*, 4 *Deg. & S.* 367); *even though the resolution authorizing their payment may have been passed in his lifetime* (*Clive v. Clive, Kay*, 600)." Unfortunately the last case cited is not accessible to us.

Besides the above, the cases in 10 *Ves.* 185, 290; 13 *Ves.* 363; and 14 *Ves.* 70; and also the American cases, *Phelps v. Farmers' Bank*, 26 *Conn.* 272; *Minot v. Paine*, 99 *Mass.* 106; *Goodwin v. Hardy*, 57 *Me.* 143, may be referred to. These all relate to the right of a tenant for life to dividends, both declared and payable in his lifetime. So, none of them are in point to the present question. But in the discussions it seems to be generally assumed that the ownership of the stock, when the dividend became payable, fixed the right to it. As in the case of rent, it is only when it becomes payable, that the dividend becomes "fruit fallen," and detached from the principal estate, so as not to pass with it.

BY THE COURT.—Judgment reversed

Commonwealth v. Pittsburgh, &c. R. R. Co.

THE COMMONWEALTH v. THE PITTSBURGH,
FORT WAYNE, & CHICAGO RAILROAD
COMPANY.

Supreme Court of Pennsylvania, 1873.

Increase of capital stock. Taxation of stock dividends. A nominal increase in the number of shares of stock in a railway corporation, without any transfer to the shareholders of anything of value from the treasury or property of the corporation,—merely watering the stock,—is not a dividend within the letter or spirit of an act imposing a tax upon all dividends to shareholders, including stock dividends.

The fact that the new form of the stock gives it a greater commercial value does not render the increase in the number of shares a dividend of any profit or property of the company.

Officers. Evidence. Statements made in a letter or other document written by an officer of a railway corporation, not accompanied by proof that he had authority to represent the company, or that his duties extended to the business in question, are not admissible in evidence against the company.

Error from the supreme court of Pennsylvania to the court of common pleas of Dauphin county.

This was an action for taxes. The facts of the case and the questions involved appear in the opinion.

AGNEW, J.—The whole question in this case depends on the fact whether the increase in the stock of this company was a stock dividend. If it was, it must be conceded that this increase is the subject of the tax of one-half mill for every one per cent. of dividend, under the fourth section of the act of May 1, 1868. 2 *Bright. Dig.* 1382, pl. 157. A stock dividend is a thing well understood, and has been passed upon by

Commonwealth v. Pittsburgh, &c. R. R. Co.

this court in several instances. In *Commonwealth v. Cleveland, &c. R. R. Co.*, 5 *Casey*, 370, it was said that, "in assessing the tax no difference can be made between the dividends actually paid to the stockholders, and stock dividends, which are profits added to the stock of each corporator." Nor is it necessary that the corporation should formally declare the dividend payable in stock. This was determined in the *Lehigh Crane Iron Co. v. Commonwealth*, 5 *P. F. Smith*, 448. There a company with a capital of one hundred thousand dollars, from time to time increased its capital from its earnings until its stock reached to nine hundred thousand dollars, and we held that the increase, having resulted from earnings, was liable to the half mill tax. It was a dividend *made* though not so declared. We said then that the earnings of the original capital belonged to the owners of the stock in proportion to their shares. So long as they remained in the profit and loss account, there was no division, express or implied, but when added to the capital and made a basis of dividends to the stockholders, they then reaped the actual benefit of the earnings of their stock.

On the question, what is the true capital of a company as the basis of dividends, a converse of the last case is that of the *Citizens' Passenger R. R. Co. v. Philadelphia*, 13 *Wright*, 251. The authorized capital of that company, on which it declared its dividend, was five hundred thousand dollars, but its actual capital paid in was but one hundred and ninety-two thousand seven hundred and fifty dollars, and the question was whether the tax should be estimated on the authorized or on the paid-up capital. The estimate on the nominal capital drew the dividend below six per cent., the charter limit, and hence the controversy. This court, by THOMPSON, J., held that the paid-up stock, not the nominal amount, was the true basis of taxation, and on that the dividend exceeded six per cent. The

Commonwealth v. Pittsburgh, &c. R. R. Co.

obvious reason is that the earnings or profits of the stockholders on their actual investment is the real ground on which the tax is laid. This purpose is manifested by the letter of the act as well as its spirit. The fourth section of the act of May 1, 1868, is in these words: "The capital stock of all companies whatever, incorporated, etc., shall be subject to and pay into the treasury of the commonwealth annually at the rate of one-half mill for each one per cent. of dividend made or declared by such company." A dividend is not capital, but the product of capital, and this product it is which the law by its own terms makes both the criterion and the measure of the taxation of the capital. Thus if a profit upon the actual capital or investment be either made or passed over to the stockholders without declaration of dividend, or if a dividend be declared to them, the sum so made or so declared becomes the measure of the tax. If it be *made* and added to the investment of the shareholders in the form of new capital, though not declared as a dividend, still it must be taken and deemed to be a dividend of the earnings of their original capital, and the new stock is called a stock dividend. This is the point decided in the Lehigh Crane Iron Works case, *supra*. On the other hand, if a dividend be declared and set apart to the shareholders, the stock is taxable on the basis of this declaration, of which it makes return by law to the auditor general. The company is estopped by its declaration and report, whether the dividend be earned or not. *Atlantic, &c. Tel. Co. v. Commonwealth*, 16 *P. F. Smith*, 57. The late chief justice said, in the last case, the only question was whether the court below erred in regarding the returns as the true evidence of what dividends were declared as the basis of the auditor general's settlement. He remarked: "She (the commonwealth) is dealing with her own corporation and acting solely *on the evidence* of its doings in regard to the subject of its lia-

Commonwealth v. Pittsburgh, &c. R. R. Co.

bility to taxes, viz. : *dividends* made or declared. This is shown by its proper officer, the treasurer, in his return to the auditor general; and the *basis* of that taxation is the *dividends declared* and paid." And again : "By whomsoever the stock is held, the measure of the tax is upon the *dividends declared*, and no such thing as partial dividends is ever to be presumed. When a dividend is declared (he continues), that gives the measure and furnishes the rule for the tax." This ruling derives greater force from the language of the original act of April 29, 1844, the prototype of the act of 1859, from which section 4 of the act of May 1, 1868, was taken. The act of 1844 was that the amount of the tax chargeable on the capital stock on which a dividend *or profit* of six per cent. per annum or more shall be made and declared shall be at the rate of one-half mill on each one per cent. of such dividend *or profit*. This "profit" was the legislative synonym of the *dividend* which should measure the tax. In the case of the Phoenix Iron Co. v. Commonwealth, 9 P. F. Smith, 104, the legislation on the subject of the tax on the capital stock is traced, and the difference is shown between the state tax on dividends specifically and on the capital stock as *measured* by the dividends. In that case the difference between the acts of 1844 and 1859 was pointed out, which is that instead of a valuation of the stock, as per act of 1844, when the dividend fell below six per cent., the act of 1859 required payment of the tax at the rate of half a mill for each one per cent. of dividend made or declared, and provided for the valuation of the stock according to the act of 1844, only when the corporation *failed* to make or declare any dividend. But when dividends are made or declared they still continue to be the criterion and the measure of the tax. In this respect, therefore, the law is still the same as under the act of 1844, which expressly denominates the dividend as profit.

Commonwealth v. Pittsburgh, &c. R. R. Co.

the new certificate representing precisely the same stock covered by the old certificate, altered only by a numerical subdivision of shares, which made one hundred by the former computation to stand as one hundred and seventy-one by the latter. Nothing new in the shape of profit or property, so far as it appears from the evidence, passed from the company to the stockholders. The existing shares summed up a capital of eleven million four hundred and ninety-seven thousand seven hundred dollars, on which twelve per cent. would yield a dividend of one million three hundred and seventy-nine thousand seven hundred and twenty-four dollars. The new or guaranteed stock, at the rate of increase, gives a capital of nineteen million six hundred and sixty-five thousand dollars, on which seven per cent. gives a dividend of one million three hundred and seventy-six thousand five hundred and fifty dollars—a shade less than the old form yielded. A further calculation shows also that the increased number of shares in the new form counterbalances the decreased percentage in the dividend, and that the commonwealth loses nothing in her tax.

Thus standing on the report of the company, which according to the case of the Atlantic and Ohio Telegraph Company must be taken to be true in the absence of other evidence, no dividend or profit was made to the stockholders, and consequently the increase in the number of the shares was not a stock dividend and not a basis of taxation.

But had the rejected evidence been admitted, a new aspect might have been given to the case. A grave question would then have arisen, whether the increase of the stock was not an increment, arising from an actual appreciation of the entire property of the corporation, which it sought to transfer to its stockholders, under color of a mere transmutation in the form of the stock. If this were the case, it cannot be doubted that

the value thus transferred in the form of stock would constitute a stock dividend and be the measure of the tax. The rejection of the evidence becomes, therefore, an important assignment of error. It involves a nice discrimination, and yet we think the court was right in its ruling. The document offered was not issued by the company, but was framed and circulated by the trustee in the mortgage given to secure the bond creditors of the company. As a document its assertions were not binding on the company without evidence of their previous authority or subsequent adoption. There was no evidence of either, excepting what shall be found in the letter of Mr. Farley, the auditor of the company, to the auditor general in respect to an inquiry of the latter. There was no evidence of Mr. Farley's authority to represent the company in this matter, or that the duties of an auditor of the company extend to this business. His authority, therefore, can only be an implication, and the extent of it cannot exceed the terms of the letter itself. Then, assuming an implication of authority to Mr. Farley, the document to which he refers he adopted only to the extent of those parts to which he refers the auditor general, as explanatory of the action of the railroad company. Beyond these parts of the document there is no evidence of adoption by the company, actual or inferential. To infer that the statements of a trustee for a different purpose, with no evidence of his authority to make them, outside of the portions adopted by another person without evidence of his authority to adopt the entire document, are binding on the company, would stretch the doctrine of presumption beyond the boundaries of safety. Such a presumption would leave the company at the mercy, whim, caprice, or prejudice of a jury. It was in the power of the commonwealth or her officers, had they made the effort, to supply the evidence of authority, if it existed, or the evidence of the facts themselves recited in the

State v. Jones.

circular. In regard to the facts, the causes of the Commonwealth must be tried according to the same rules of evidence which apply to other suitors,—she must supply the evidence of them, and if by loss or a want of evidence she fails, the misfortune of the fault is her own. The absence of evidence cannot be supplied by presumptions at war with justice as well as with the ordinary rules of evidence. The error of the argument which without evidence demands a presumption of a dividend of profits from a mere increase of capital, will be treated of in an opinion to be read in the case of the Erie and Pittsburgh Railroad Company v. Commonwealth. There being no evidence on the trial that there was a dividend either made or declared, there was nothing to be submitted to the jury.

BY THE COURT.—Judgment affirmed.

THE STATE v. JONES.

67 North Carolina, 210.

Supreme Court of North Carolina; June Term, 1872.

State bonds held by railroad companies. Indictment. Although the language of the act of North Carolina of February 18, 1871,—which requires the president and directors of a railroad company to account with and transfer to their successors all the money, books, papers, and choses in action belonging to such company, and makes a failure to do so a misdemeanor,—is sufficiently general to include bonds of the State, yet that act cannot be construed to apply to the special tax bonds which, by the acts of February 5 and March 8, 1870, are required to be returned to the public treasurer; and an indictment against the president of a railroad company, for refusing to transfer to his successor such special tax bonds, cannot be sustained.

State v. Jones.

Appeal to the supreme court of North Carolina from the superior court of Moore county.

This was a criminal prosecution for a refusal to transfer certain bonds to the successor of the defendant as president of a railway company, contrary to statute.

The indictment charged, in substance, that the defendant, A. J. Jones, "was heretofore president of the Western Railroad Company, and that on or about January 18, 1872, one L. C. Jones was elected president, to succeed the said A. J. Jones as president, and that on February 23, 1872, demand was made by the president and directors of said company upon the said A. J. Jones, that he should account with the president and directors of said company, who had been elected to succeed him, the said A. J. Jones, president, and the late directors of said company, and transfer to them forthwith all the moneys, books, papers, choses in action, property, and effects belonging to the said company, and that the said A. J. Jones, &c., did refuse to account for and transfer to the said president, &c., all the money, books, papers, choses in action, property, and effects belonging to said company, for which he ought to have accounted and transferred to them, to wit: certain coupon bonds of the state of North Carolina, which said bonds were delivered to the said A. J. Jones, president of the Western Railroad Company, on or about June 22, A. D. 1869, by the public treasurer of the said state, in payment of the subscription made by the state of North Carolina to the capital stock of the said Western Railroad Company, amounting to about the sum of one million two hundred and sixty-four thousand nine hundred and eighty-three dollars and forty-two cents, which were received by the said A. J. Jones for the use and benefit of said company, and also certain money which had been at times received by the said Jones while president, for

State v. Jones.

the use and benefit of the company, to the evil example, &c., and contrary to the statute in such case made and provided, and against the peace and dignity of the state."

Defendant pleaded not guilty.

The evidence showed that the defendant, as president of the Western Railroad Company, received from the state treasury one hundred and thirty-two special tax bonds, with coupons attached, and running for thirty years. He also received thirty thousand dollars in cash, in payment of interest on these bonds. A demand was made by the president and directors for the bonds (special tax) issued for the benefit of the company, and "all other assets and effects of the company." Defendant presented an account of fifty-five thousand dollars; said he did not recognize the authority of the directors, but proposed to leave the account if they would allow it. The board refused to allow it. It was then withdrawn. He stated that the bonds had been placed in the hands of brokers to be sold, and that only a portion had been sold. None of the bonds were returned to the railroad company or to the state treasury.

The counsel for the defendant asked the court to charge:

That the act of February 3, 1869, under which these bonds were issued, was no longer operative, having been repealed by an act ratified March 8, 1870.

1. That the repealing act of March 8, 1870, is valid, because the power of repeal was reserved to the legislature by art. 8, sec. 1, of the constitution.

2. If the repealing act of March 8 is not valid in consequence of the legislature having no right to repeal, still the special tax bonds are not subject to be accounted for by the defendant; because they are not named in the act of February 16, 1871, under which the indictment is drawn, and because the act of

State v. Jones.

February 16, 1871, could not have these special tax bonds in view, as it was passed subsequently to the act of February 5, 1870, being the act to restore the credit of the state, which required the return of these bonds to the state treasury.

3. If the repealing act of 1870 is valid, it affected all the special tax bonds authorized by the act of February 3, 1869, to be delivered to the Western Railroad Company, not only the one million dollars to pay the additional subscription, but also the five hundred thousand dollars in bonds to be exchanged for second mortgage bonds, &c.

The court charged, in response to this request, that whether the act of March 8, 1870, was valid or not, it did not relieve the defendant from liability, under the act of February 16, 1871, for what he may have received for the use of the railroad company. Compliance with the act, requiring a return of the bonds to the state treasury, would have relieved the defendant from liability, but such compliance is nowhere alleged or proved.

The court was further of opinion, that, although the act of February 16, 1871, did not mention coupon bonds *nominatim*, yet terms are used broad enough to embrace them, viz: all moneys, books, papers, choses in action, property, and effects of every kind and description belonging to said company.

The jury returned a verdict of guilty. A rule for a new trial was discharged. There was a motion for a *venire de novo*, which was also refused; and a motion in arrest of judgment was overruled. The defendant appealed from the judgment.

Attorney General, McRae, and Battle & Son, for the state.

B. & T. C. Fuller, for the defendant.

State v. Jones.

PEARSON, Ch. J.—It is not enough that a man is guilty ; his guilt must be proved according to the law of the land, before he can be punished. This principle is set out in “the Declaration of Rights,” as a sacred guaranty necessary for the protection of life and liberty.

The prisoner is indicted under the act of February 16, 1871. The gravamen of the charge is, that as president of the road he received a million and a quarter of the bonds of the state, and on demand by his successor in office failed to account for and transfer the said bonds. The prisoner has no doubt been guilty of a breach of his official duty ; say, he squandered away these bonds—committed a devastavit, as the old books term it ; say, if you choose, that he carried the bonds to the city of New York, and recklessly lost them at gaming tables—for which he deserves and has received the reprobation of all honest men ; still if the bonds are not embraced by the provisions and meaning of the statute under which he is indicted, his guilt has not been proved according to the law of the land.

We are of opinion that the act of February 16, 1871, does not embrace these bonds. The general words of the act are broad enough to include these bonds, and if the act stood by itself, such would be its construction ; but there are two other acts that must be taken in connection with the act under consideration, and the matter is made clear by the forcible point of view in which it was presented by Mr. Fuller, on the argument.

Suppose the three acts to be set out in one statute. Section 1. It shall be the duty of the several presidents of railroads, who have received bonds of the state, to file before the governor a statement on oath, showing the amount of the bonds received, what amount of the bonds have been sold or hypothecated, and what

State v. Jones.

amount of the bonds remain on hand. And it shall be the duty of such president to return to the *public treasurer*, subject to the order of the governor, all of the bonds remaining on hand, and in case of neglect or refusal, such president shall be guilty of a felony, and on conviction, he shall be imprisoned in the state prison for not less than five years. Prosecutions under this act shall be in the superior court of Wake county (Act February 5, 1870). Section 2. All acts passed at the last session of the legislature, making appropriations to railroad companies, are hereby repealed, and all bonds of the state issued under said acts, now in the hands of any president, shall be immediately returned to the treasurer (Act March 8, 1870). Section 3. The presidents of the several railroads in this state are hereby required, upon demand, to account with the presidents elected or appointed to succeed them, and shall transfer to such successors forthwith, "all the money, books, papers, choses in action, property, and effects of every kind and description, belonging to such company, and a refusal to account for and transfer all the money, books, &c., as herein required, shall be deemed a misdemeanor, and such president, upon conviction in any superior court of the state, shall be punished by imprisonment in the penitentiary of the state, for not less than one nor more than five years, and by fine, at the discretion of the court" (Act February 16, 1871).

By the first two sections, the acts under which the special tax bonds (as they are termed) were issued, are repealed. The bonds are declared to be worthless, and a requisition is made upon the presidents of the railroads having any of them on hand, immediately to return them to the public treasurer, on pain of imprisonment for not less than five years in the penitentiary.

By section 3, if it be construed to embrace "special tax bonds," the bonds are treated as things of value,

State v. Jones.

belonging to the railroad company, and the outgoing presidents are required to account for and to transfer these bonds to their successors, on pain of imprisonment in the penitentiary not exceeding five years.

This construction makes the three acts inconsistent, and results in absurdity. How can the president of a railroad transfer to his successor in office the very same bonds which he is required to return to the public treasurer?

This absurdity is avoided by the construction that the acts of February, 1870, and March, 1870, dispose of the special tax bonds, and the act of February, 1871, has reference only to money, choses in action, property, and effects belonging to the company, and remaining in the hands of a president, who has gone out of office, and refuses on demand to account for and transfer the same to his successors. This must be so, unless we impute to the general assembly an intention, "covertly," to repeal the acts of February 5, 1870, and March 8, 1870, and by the use of general words in the act of February 16, 1871, to give to the special tax bonds a direction, as things of value belonging to the railroad company, different from the disposition which had been made of them by the two preceding acts, in which these bonds are specified *nominatim* and expressly. Had the intention been to repeal the two preceding acts, and to make a different provision in regard to the special tax bonds, it was easy to have said so, in direct words, and we are not at liberty to assume that it was the intention to effect the purpose by indirection. *State v. Krebs*, 64 N. C. 604, is in point. "General words in a statute do not authorize an act to be done, which is expressly prohibited by a former statute; plain and positive words must be used." In that case, the defendant justified under a statute, allowing the corporation to sell land, &c., "in any manner or mode that the corporation shall deem

State v. Jones.

best." It was held, these general words do not authorize sales by means of lotteries, that mode of selling being expressly prohibited by a former statute. *McAden v. Jenkins*, 64 *N. C.* App. 800, is also directly in point. The treasurer of the state was directed to deliver to the Wilmington and Rutherford Railroad Company five hundred thousand dollars of the bonds of the company, upon the surrender to him of "five hundred thousand dollars of state bonds." Here the words were general; but it is held that special tax bonds are not embraced by the provision and meaning of the act, as such bonds had been by previous legislation declared to be worthless and of no value. We rely upon these two cases, and have nothing further to say than what has been already said. This disposes of the case, and entitles the prisoner to a *venire de novo*.

The bill of indictment, after charging the prisoner with a misdemeanor in respect to the "one million two hundred and sixty-four thousand nine hundred and eighty-three dollars and eighty-two cents of special tax bonds," adds "and also certain money which had been at divers times received by the said Andrew Jackson Jones, while president of said company, for the use and benefit of said company."

It is evident, from the statement of the case sent up to this court, that this little charge about the *money* which the prisoner had received, was on the trial in the court below run over and passed by, like a rabbit in a fox chase; neither the counsel nor the judge nor the jury seem to have had this little money item of fifty-five thousand dollars in view. The whole field, men, horses, and dogs were in hot pursuit and open cry of the one million two hundred and sixty-four thousand nine hundred and eighty-three dollars and eighty-two cents of bonds, the gravamen of the prosecution; so, in point of fact, as to the item of fifty-five thousand dollars in money, the prisoner has never been tried. If

State v. Sloan.

allowed to look at the evidence which his Honor has sent up for our perusal, we should say the prisoner was ready and willing to account for the money that had come into his hands ; in fact he tendered an account in respect to the money and exhibited his vouchers, showing a balance in his favor of some three thousand dollars. It is evident that the demand in regard to the bonds, which, as we have seen, the company had no right to make, under the act of 1871, was the cause of the refusal by the company to accept and consider the account, which the prisoner tendered to the new president and directors, in respect to the money, and his vouchers for its expenditure. In this point of view his Honor ought to have left it to the jury to say whether the prisoner was not ready and willing to account for the money received by him, apart from the special tax bonds ; and whether the account and transfer in regard to the money, choses in action, property, and effects of the company, would not have been effected but for the claim on the part of the company in respect to the special tax bonds.

There is error.

BY THE COURT.—*Venire de novo.*

THE STATE v. SLOAN.

67 North Carolina, 357.

Supreme Court of North Carolina; June Term, 1872.

State bonds held by railway companies. Indictment. In a criminal prosecution founded on a statute requiring all presidents of railroads in which the state is interested under any act or ordinance

State v. Sloan.

passed after a specified date, to return to the public treasurer all bonds of the state remaining in the hands of such president, an indictment which merely charges that the defendant was president of a certain named railroad, and as such refused to return bonds which had come into his hands, is fatally defective for want of averments that the state had an interest in the road named, and that the bonds were received by the defendant under an act passed after the date specified. A motion to quash such an indictment should be granted.

Appeal to the supreme court of North Carolina from the superior court of Wake county.

This was a criminal prosecution for a refusal to return certain bonds to the public treasurer, contrary to statute.

The substance of the indictment, and the material portions of the statute upon which it was founded, are stated in the opinion.

A motion to quash the indictment was sustained ; and from this decision the state appealed.

Attorney General, and Battle & Son, for the state.

Fowle and Bailey, for the defendant.

RODMAN, J.—We think there is no difficulty as to the rule, which courts will in general observe, as to quashing indictments. If one be clearly defective, and would not support a conviction, the court will quash it, whether it be for a felony or for a less offense. Because in such a case it is useless to the state, and oppressive to the accused, to proceed to a trial which can amount to nothing. As by quashing, the recognizance of the prisoner is discharged, the court, if the offense charged be a heinous one, and especially if there be danger that the prisoner will flee from justice, may in its discretion delay its decision for a reasonable time, to give the

State v. Sloan.

grand jury an opportunity to find a new bill. And whether the charge be of a felony or of a misdemeanor, if the motion shall require the decision of a difficult and important question of law, inasmuch as a refusal to quash does not amount to a final decision, and the question of law will still remain open on a motion in arrest of *judgment*, the court will refuse to decide the question upon a state of facts which is only hypothetical; as the accused may be acquitted, and so a decision become unnecessary. This is in conformity with the general practice of courts, not to decide such a question until it shall be necessary to do so. This is about all that is meant, when it is said the court has a discretion to quash.

The only question, therefore, is, does the present indictment so clearly fail to charge an offense that, no matter what may be proved, all proceedings under it must end in the discharge of the accused.

The indictment is founded on a supposed violation of chapter 38 of the Acts of 1869-'70, p. 78.

That act enacts, Section 1, "It shall be the duty of the several presidents or other officers of railroads who have secured bonds or other securities of the state for the construction of any road in which the state is interested, under an act of the general assembly, or ordinance of a convention passed since May, year of our Lord 1865," to file before the governor and superintendent of public works a certain statement.

It will be noticed that the word "secured" in this section is senseless in the connection in which it is found. It may not unfairly or improperly for the present purpose be supposed that the true word is "received." But if anything turned upon it finally it would be necessary to consult the original act as enrolled in the secretary's office before accepting the substituted word.

Section 3, to some extent, changes the phraseology

of section 1. It enacts, "It shall be further the duty of every president or other officer of a railroad, as provided in section first of this act, and every such president or other officer is hereby required, to return to the public treasurer, subject to the joint order of the governor and superintendent of public works, as hereinafter prescribed, all bonds of the state which have been issued under any authority of law and which remain in the hands of any such president or other officer unsold or undisposed of," &c..

Section 4 requires the governor to have notice served on every such president, &c.

Section 5 prescribes that the time within which such president, &c., shall comply with the provisions of the first three sections of the act shall be twenty days from the personal service above provided for.

Section 9 is in these words: "If the president or other officer of any railroad company in which the state is interested within the purview of the first five sections of this act, shall willfully refuse or fail to comply with the said provisions thereof, every such president or other officer shall be deemed guilty of felony, and upon conviction shall suffer imprisonment in the state prison for not less than five years."

The other sections contain nothing material for the present purpose.

The counsel for the accused contends that the indictment is clearly defective and fails to charge any offense; in this: 1. That the act upon which the indictment is founded relates only to presidents, &c., of railroads in which the state is interested; and the indictment does not anywhere charge that the accused was president of a road in which the state was interested.

The indictment, abbreviated by omitting everything not material to the present question, charges:

1. That the accused, on a day after the ratification

State v. Sloan.

of the act, was, and continued to be, president of the Wilmington, Charlotte, and Rutherford Railroad Company.

2. That it became his duty, under the act aforesaid, to make a statement to the governor, &c., and after being notified, &c., to return to the public treasurer "all bonds of the state which were issued under authority of law, and which remained in the hands of said William Sloan as president," &c.

3. That he was duly notified to report as aforesaid, and to return the bonds, &c.

4. "That notwithstanding a large amount of bonds, money, and securities, to wit: two millions of dollars in bonds, had come into the hands of said William Sloan, a large portion of which bonds, moneys, and securities were, on March 2, still in the hands of him the said William Sloan, on March 2 in the year last aforesaid, unlawfully and willfully refused, neglected, and failed to return to the public treasurer," &c.

It will be seen that the indictment does not expressly aver that the accused was president of a railroad in which the state was interested, and that the statute only embraces presidents of such railroads as the state had an interest in.

The learned counsel for the state, however, contend that, inasmuch as the act incorporating the Wilmington, Charlotte, and Rutherford Railroad Company is a public act, and the act, chapter 20, Acts 1868-'69, ratified January 29, 1869, under which the state gave a certain amount of its bonds to that company in exchange for shares of its stock, is also a public act, of which the court is bound to take cognizance, the court must know that the State had an interest in that road; and inasmuch as the indictment avers that the accused was president of the Wilmington, Charlotte, and Rutherford Railroad Company, the court must know that he was president of a railroad in which the state

State v. Sloan.

had an interest, and the averment that he was president of the Wilmington, Charlotte, and Rutherford Railroad Company, was equivalent to a direct and express averment that he was president of a railroad in which the state had an interest.

We concede that the acts referred to are public acts, of which the court takes judicial cognizance, and that the court knows that the state is interested in a company called the Wilmington, Charlotte, and Rutherford Railroad Company. But notwithstanding this, it does not appear from the indictment, and the court cannot know, that the accused is president of that identical Wilmington, Charlotte, and Rutherford Railroad Company in which the state is interested. Mere similarity of name is not equivalent to an averment of identity. For aught that appears he may be president of some other company of the same name, but in which the state is not interested. No one contends that an indictment must be "certain to a certain extent in every particular," that would require it to anticipate and exclude every possible defense of the accused. But it is undisputed law, that when a statute enacts that any one of a certain class of persons, who shall do or omit a certain act under certain circumstances, shall be guilty of a crime, the indictment must describe the person indicted as one of that class, and aver that he did or omitted the act under the circumstances which make it a crime. Every one of these things is an essential constituent of the crime.

In this case, the act makes it a crime, in a president of a railroad in which the state is interested, to fail to do a certain thing, and it is not charged that the accused was president of such a road. Clearly no crime is charged.

2. That section 1, of the act of 1869-'70, imposes only on the president, &c., of railroads, "who have received bonds or other securities of the state, &c., under

Chicago, &c. R. R. Co. v. People.

an act of the general assembly or ordinance of a convention, passed since May, 1865," the duty to return such bonds to the treasurer, &c. And this is not altered by section 3, which expressly refers to section 1.

Now, the indictment nowhere charges that the defendant had received bonds, &c., under an act, &c., passed since May, 1865. It only says "that notwithstanding a large amount of bonds, &c., had come into the hands of said W. S., &c., he refused, &c."

We think the indictment is clearly defective in this respect also. It does not aver that defendant ever received any of the bonds, &c., the failure to return which is made an offense; the bonds, which he had, may have been purchased by the company in the market, and not received under any act, &c.

The counsel also took a third exception, which it is unnecessary to consider.

We concur with the judge below that the indictment should be quashed.

BY THE COURT.—Judgment affirmed.

**THE CHICAGO & ALTON RAILROAD COMPANY
v. THE PEOPLE.**

Supreme Court of Illinois; February Term, 1873.

Legislative power to control rates of charges by railways. The legislature of a state has power to pass an act to prevent unjust discriminations in the rates of charges for freight by railways, either as between individuals or communities, and to enforce its observance by appropriate penalties.

Such an act does not impair the contract between the state and a railway company, constituted by the charter of the corporation.

Chicago, &c. R. R. Co. v. People.

The well-settled rule of the common law, that common carriers shall not make unjust and injurious discriminations in their rates, applies to natural and artificial persons alike, by virtue of their function as common carriers, the moment they commence the transportation of freight; and railway companies must be deemed to accept their charters subject to this implied limitation.

But an act which prohibits not merely unjust discriminations, but discriminations of any character, and which imposes as a penalty a forfeiture of the franchises of any railway company making any discrimination in its rates, violates the constitution of Illinois, which empowers the general assembly to pass laws to prevent unjust discrimination, and to enforce such laws by adequate penalties.

Appeal to the supreme court of Illinois from the circuit court of McLean county.

This was a proceeding by information in the nature of a *quo warranto*, commenced upon the relation of the railroad and warehouse commissioners, for the purpose of obtaining an adjudication that the defendant had forfeited its franchises for a violation of the act of the general assembly, "to prevent unjust discriminations and extortions in the rates to be charged by the different railroads in this state for the transportation of freight on said roads."

The information alleged that the defendant was, at the time of the committing of the grievances complained of, and still is a railroad corporation, organized under the laws of this state, and engaged in the business of transporting merchandise between Chicago and East St. Louis, and between those places and intermediate ones, and between such intermediate places respectively. That the line of defendant's road extends from Chicago through Lexington and Bloomington; and that the defendant had repeatedly charged and received, for transporting lumber from Chicago to Lexington, a distance of one hundred and ten miles, the sum of five dollars and sixty-five cents per thousand feet; while at the same time it had only charged and

Chicago, &c. R. R. Co. v. People.

received for the transportation of like lumber from Chicago to Bloomington, a distance of one hundred and twenty-six miles, the sum of five dollars per thousand feet. By means of which acts the information alleged that the defendant forfeited its franchise, and had since such forfeiture wrongfully exercised the privileges conferred by its charter.

The defendant by its plea admitted that it had repeatedly charged and received five dollars and sixty-five cents per thousand feet for the transportation of lumber from Chicago to Lexington, while it at the same time charged and received only five dollars per thousand feet for the transportation of like lumber from Chicago to Bloomington. And it set up the several acts of the legislature by which it was incorporated, and insisted that it had the right to fix tolls for transportation of property at its discretion; and that the act of 1871 was in violation of the contract made with it by the legislature in its charter, and was therefore void under the provision of the constitution of the United States forbidding any state to pass any law impairing the obligation of contracts. The plea further alleged that the charges for transporting lumber from Chicago to Lexington were fixed by the president and board of directors of the defendant as reasonable, and were in fact reasonable. That the charges for transporting lumber from Chicago to Bloomington were unreasonably low, but were adopted in order to compete with the Illinois Central Railroad Company, so as to protect the customers of the defendant from an attempted injury in the reduction of the rates by the Illinois Central Railroad Company.

To this plea a general demurrer was interposed and sustained, and a judgment forfeiting the corporate franchises rendered against the defendant; from which judgment the defendant appealed.

Chicago, &c. R. R. Co. v. People.

The constitution of the state of Illinois, adopted in 1870, contains the following provisions :

“Railways heretofore constructed, or that may hereafter be constructed in this state, are hereby declared public highways, and shall be free to all persons for the transportation of their persons and their property thereon, under such regulations as may be prescribed by law. And the general assembly shall from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on the different railroads in this state.” Art. XI. § 12.

“The general assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different roads in the state, and enforce such laws by adequate penalties, to the extent, if necessary for that purpose, of forfeiture of their property and franchises.” Art. XI. § 15.

Section 1 of the act of the legislature of April 7, 1871, upon which this information was founded, is as follows :

“No railroad corporation, organized or doing business in this state, under any act of incorporation or general law of this state now in force, or which may be hereafter enacted, shall charge or collect for the transportation of goods, merchandise, or property on its said road, for any distance, the same nor any larger nor greater amount as toll or compensation, than is at the same time charged or collected for the transportation of similar quantities of the same class of goods, merchandise, or property over a greater distance upon the same road.” *Laws of 1871-72*, p. 635.

The substance of the remaining sections of the act is stated in the opinion.

LAWRENCE, Ch. J.—This record brings before us the

Chicago, &c. R. R. Co. v. People.

proceedings upon an information in the nature of a *quo warranto*, filed by the railroad commissioners of the state against the Chicago and Alton Railroad Company, under the act which went into operation July 1, 1871, entitled "An act to prevent unjust discriminations and extortions in the rates to be charged by the different railroads in this state for the transportation of freight on said roads."

The information set forth that the company, in violation of this act, had repeatedly charged and received for transporting lumber from Chicago to Lexington, a distance of one hundred and ten miles, the sum of five dollars and sixty-five cents per one thousand feet, while at the same time it had only charged for transportation of like lumber from Chicago to Bloomington, a distance of one hundred and twenty-six miles, the sum of five dollars per one thousand feet. The company, by way of defense, pleaded its charter, and alleged that the rates of toll from Chicago to Lexington were in fact reasonable, while the rates from Chicago to Bloomington were unreasonably low, and were established because of the competition at the latter point with the Illinois Central Railroad Company. To this plea the relators demurred. The demurrer was sustained; a judgment of ouster was pronounced against the company, and its franchise was declared forfeited. From this judgment the company has prosecuted an appeal to this court.

The question involved in this record is the constitutionality of the act of the legislature under which the information was filed. The object of the general assembly in passing the law is indicated by its title, which we have already given. The substance of the first section of the act is, that no railroad corporation in this state shall charge a larger compensation for the transportation of freight over any distance than it is charging at the same time for freight of the same class over

Chicago, &c. R. R. Co. v. People.

a less distance; nor shall it charge the same amount that it charges over a less distance. Another clause of the same section provides that no railroad company in this state shall charge a larger compensation for freight over any portion of its road than is charged for freight of the same class over any portion of equal length.

Section 2 of the act merely defines what is meant by the phrase, "railroad corporation."

Section 3 makes the rates of the year 1870 the standard for freight charges. This section is not brought before us by this record.

Section 4 provides for the recovery of a penalty of one thousand dollars in an action of debt, together with a reasonable attorney's fee, by any person aggrieved by the violation of this act.

The fifth and last section provides that any unlawful violation of this act by any railroad corporation "shall be deemed and taken a forfeiture of its franchises," and authorizes a proceeding to that end, such as is before us in the present record.

Very elaborate arguments have been filed by counsel, but they are chiefly devoted to a discussion of the power of the legislature to control the rate of railway charges or to fix their maximum limit. It is urged by counsel for the company that its charter is a contract with the state, by which the latter has irrevocably granted to the corporation the right to establish its rates of toll, subject only to an implied condition, which is admitted by counsel, that they shall not be unreasonable or excessive. It is further urged that this charter, with all the privileges it granted, is protected under that clause of the constitution of the United States which prohibits the states from enacting any law impairing the obligation of contracts. On the other hand, it is contended by counsel for the relators, that railroad corporations which obtain their right of way through the exercise of the right of eminent domain—

Chicago, &c. R. R. Co. v. People.

a right belonging only to the sovereign power of the state, and to be delegated by that power only for public purposes—must be regarded as *quasi* public corporations, and therefore subject to legislative control, so far as may be necessary for the public welfare, of which the legislature must necessarily be the judge. It is further contended that the right to control and regulate their tolls is a species of police power, which the legislature cannot alienate from the state, even if it should so desire, because essential to the proper sovereignty of the state.

These propositions of counsel invite us to a wide field of discussion, upon which we do not at present propose to enter. We have stated them for the purpose of saying, in terms, that we express no opinion in regard to them, and do not propose to do so until a case shall come before us demanding their discussion. There are laws upon our statute-book involving their consideration, but the act before us does not necessarily do so in its application to the present case, and the expression of an opinion in regard to legislation not involved in this record would be obviously improper.

Conceding, for the purposes of appeal, all that is claimed by counsel for the appellant in regard to the inviolability of railroad charters regarded in the light of contracts, we are still of opinion that the legislature has the clearest right to pass an act for the purpose of preventing an unjust discrimination in railway freights, whether as between individuals or communities, and to enforce its observance by appropriate penalties. The grounds of this opinion may be briefly stated, and they are as follows:

A railroad company is chartered, and is chartered solely for the purpose of exercising the functions and performing the duties of a common carrier.

The duties and liabilities of common carriers are clearly defined by the common law, and have been so

Chicago, &c. R. R. Co. v. People.

defined for centuries. In all commercial countries the law upon this subject is one of the most important branches of legal science, and its leading principles were established by the courts of England at an early day. One of these principles is, that nothing excuses the carrier for the non-delivery of the goods received by him for carriage except the act of God or the public enemy.

We do not find it written in the charters of railroad corporations in this state that they shall exercise their franchises subject to this stringent liability. Yet, nevertheless, this court has firmly held them to it, not permitting them to evade it even by a notice, or by any means short of a special contract with the shipper to which his free assent must be shown to have been given. Another perfectly well settled rule of the common law in regard to common carriers is, that they shall not exercise any unjust and injurious discrimination between individuals in their rates of toll. In the language of Chief Justice HOLT, when delivering the opinion of the court of king's bench, in the celebrated case of *Coggs v. Bernard Q. Raymont*, decided in 1703, the common carrier "exercises a public employment," and it necessarily follows that he must deal with the public fairly and without unjust discrimination. This common law duty of common carriers is not prescribed in the charters of railroad corporations, but, like the other duty of delivering goods in safety, unless prevented by the act of God or the public enemy, it attaches to them, by virtue of their function as common carriers, the moment they commence the transportation of freight.

In accepting their charters, which gave them an artificial existence as common carriers, they necessarily accepted them with all the duties and liabilities attached by the existing law to the function of a common carrier. This proposition seems to our mind so plain as hardly to admit of more argument than an axiom in

Chicago, &c. R. R. Co. v. People.

mathematics. While the law now imposes, and always has imposed, upon individuals exercising the vocation of a common carrier, the obligation of rendering service to all persons without injustice to any, how utterly unreasonable it is to claim that a corporation is to be permitted to discriminate in its tolls, at its own discretion and without regard to justice, merely because the legislature, in the charter that created it for the purpose of exercising a like vocation, has authorized it to establish rates of toll, without, in terms, providing that they shall be free from unjust discrimination. What was the import of that grant, made, as it was, in broad and general terms? Clearly nothing more than that the corporation should have the same right of establishing tolls that a natural person has when acting as a common carrier—a right to be exercised within the same limitations that the common law, in behalf of justice and public policy, imposes upon the natural man.

This case has been argued on both sides with commendable ability and candor, and we avail ourselves of an admission made by counsel for the company, to illustrate the position we are enforcing. It is conceded by counsel in express terms that "a natural person is not allowed to make unreasonable and excessive charges as a common carrier, and an artificial person is subject to the same restrictions." It is, of course, contended by counsel that the legislature has no power to determine what charges are reasonable or unreasonable, but with that branch of the question we have in this case no concern. It is undoubtedly true, as conceded by counsel, that the artificial person has no more right than the natural person to make unreasonable and excessive charges as a common carrier. And why? This restriction is not found in railway charters as generally framed, and certainly not in the charter presented in this record in regard to which counsel are speaking. The obvious reason is the principle we have

Chicago, &c. R. R. Co. v. People.

already stated. The rule forbidding unreasonable charges was a common law rule when these charters were granted, and the companies accepted their charters with this implied limitation upon the power granted, in general terms, to establish their rates of freight. If this implied condition against unreasonable rates of freight attached by the existing law to their charters at the date of their acceptance, on what ground can it be held that the corresponding condition against unjust discrimination did not equally attach? There is no ground for the distinction. The charters were granted for the purpose of furnishing improved means of transportation and travel to all persons alike, without unjust discrimination between individuals or communities, and they were accepted with the knowledge that the nature of the grant imposed that obligation.

This question of unjust discrimination is not before this court for the first time. In the case of Vincent against this same company, 49 *Ill.* 33, we held that railway companies can make no injurious discrimination between individuals, and therefore could not charge one rate for delivering grain at a certain elevator in Chicago and a higher rate for delivering at another elevator in the same city, and equally accessible upon its line.

The same rule was recognized in *People v. Chicago, &c. R. R. Co.*, 55 *Ill.* 111, though the facts of that case were found not to require its application. The rule was declared in *Chicago and Northwestern R. R. Co. v. People*, not yet reported, but to appear in 56 *Ill.* The opinion in that case cites several English and American cases in which it was held that railroad companies could not be permitted to practice an injurious and arbitrary discrimination between different persons, and we now refer to them without further citation.

If, then, an unjust discrimination is not to be permitted as between individuals in regard to freights, is

Chicago, &c. R. R. Co. v. People.

it any more permissible as between different communities or localities?

We are wholly at a loss to discover the slightest difference in reason or principle.

If a farmer living three miles from the Springfield station upon this company's road is charged fifteen cents per bushel for shipping his corn to Chicago, is it just that the farmer who lives twenty miles nearer Chicago should be charged a higher sum? Certainly not, unless the railroad company can show a peculiar state of affairs to justify the discrimination; and this must be something more than the mere fact that there are conflicting lines at one point and not at the other. The discrimination in such a case is as much a discrimination between individuals as it would be in reference to two persons living in the same locality and shipping at the same station, unless, as before stated, a satisfactory reason can be given for discrimination between the points of shipment, and such a reason, in the case supposed, is not very easy to conceive.

So, too, in the case before us. The resident of Bloomington who sends to Chicago for a car of lumber, is charged by the company at the rate of five dollars per thousand feet for transportation. The resident of Lexington who orders the same lumber at the same time is charged five dollars and sixty-five cents per thousand feet for a transportation sixteen miles less in distance. Is there not here, unless an explanation can be furnished by the company, an unjust discrimination between individuals, quite as much within the prohibition of the principles of the common law as would be an unjust discrimination between individuals of the same town?

We have endeavored to show on what a firm foundation rests the constitutional power of the legislature to prohibit unjust discrimination in railway freights, even

Chicago, &c. R. R. Co. v. People.

conceding what is claimed for their charters as contracts.

We should, however, be doing the counsel for the appellant an injustice, if it were to be inferred from what we have said that they distinctly assert a right on the part of the company to make unjust discriminations.

We understand them to concede in the conclusion of their argument the power of the legislature to prohibit such discriminations, but they insist that no discrimination is unjust if the person against whom it is made is not himself charged an unreasonable rate. They therefore averred in their plea to the information that the charges for freight to Lexington were in fact reasonable, and those to Bloomington were unreasonably low. But in our opinion if the act of the legislature had directed its penalties, as it should have done, not against all discriminations, but only against unjust discriminations, and had made *that* the issue to be tried, it would have been no answer to aver in the plea that the larger rates for the less distance were reasonable rates. That would have had only an argumentative bearing upon the issue to be tried, to wit, the existence of an unjust discrimination between neighboring towns. What is a reasonable rate of freight over a railroad is at best a mere matter of opinion, depending on a great variety of complicated facts, which but few persons could intelligently investigate, and which it would be wholly in the power of the company to furnish or withhold. Railroad experts might be produced who would testify that in their opinion the rate to Lexington in the present case was a reasonable rate, but the fact that a less rate was charged for the greater distance to Bloomington, if the difference was a permanently established and not a casual difference, and if it could be explained only by the fact that there was a competing line at one place and not at the other,

Chicago, &c. R. R. Co. v. People.

might be well accepted as conclusive proof that the rate to Lexington was not a reasonable rate.

The only issue to be made, under a law properly framed, would be whether there was an unjust discrimination or not. If on the trial of such an issue the prosecutor proves a permanent established discrimination, like that disclosed by the present record, and the company can show no other reason for it than the existence of a competing line at the favored point, the defense must be held unsatisfactory, notwithstanding witnesses may testify that they believe, as a matter of theoretical opinion, that the rates to Lexington are reasonable. They cannot be reasonable, and the discrimination must be unjust, if the lesser rates for the greater distance have been established merely because the company have ceased to exercise at that point a practical monopoly.

It cannot be supposed that either of the competing lines would establish a permanent rate of charges upon a scale that would not furnish a remunerative profit. The rates to Bloomington would be established under the influence of a fair competition which, by the ordinary laws that govern commerce, might be relied upon as establishing a rate not unreasonably low. At Lexington the rates would be established by the uncontrolled discretion of the company, and it should not cause surprise if they were fixed unreasonably high. If the rates are not unreasonably high at Bloomington, they are unreasonably high at Lexington. If they *are* and at all other points touched by competing lines, is it not certain that the company will indemnify itself by charging, at the stations where there is no competition, a rate unreasonably high? And will not a discrimination arising solely from such a cause be necessarily an unjust and injurious discrimination, as to all persons shipping or receiving freights at the non-competing stations?

Chicago, &c. R. R. Co. v. People.

If Lexington is a town where a considerable business is done, it is evident that this discrimination of rates, if permanently established, will diminish its business and check its growth. It was never intended or expected that these corporations should use their power to benefit particular individuals, or build up particular localities, by arbitrary discriminations in their favor, that must cause injury to other persons or places engaged in rival pursuits or occupying rival positions. It is in vain to say in defense of such discriminations, made without just cause, that the rate of charges against the injured person or locality is a reasonable rate, and therefore no injury is done.

An injury, as a matter of fact, is committed in the manner just suggested, and the legislature has the right to require the corporation to show a sufficient cause for the discrimination which produces the injury, and it cannot be permitted to evade the issue by raising the legislative inquiry as to whether the rates charged against the injured parties or localities are not, after all, reasonable rates. Even if reasonable, when regarded in reference to the profit upon the capital invested in the road, they are not reasonable in the true sense of the term, if no satisfactory reason can be given for charging less rates for the same or for greater services rendered to persons doing business with the company at neighboring stations.

From what we have said it will be seen that the object of the law under which these proceedings were instituted was, in our opinion, clearly within the power of the legislature. The law was intended to prescribe the methods by which to enforce a common law duty that the railways of the state voluntarily assume whenever they exercise the functions of a common carrier, and it is in no respect a violation of their charters. It remains to be considered whether there are defects in the details of the law which need to be

Chicago, &c. R. R. Co. v. People.

amended before it can be exercised. We are of opinion that there are such defects, but they are susceptible of easy amendment.

The discrimination forbidden by the common law to common carriers is an unjust and unreasonable discrimination. The provision in our new constitution is also against unjust discrimination. It is in the following words :

"The general assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freights and passenger tariffs on the different roads in the state, and enforce such laws by adequate penalties, to the extent, if necessary for that purpose, of forfeiture of their property and franchises." Art. XI. § 15.

This provision, expressly directing the legislature to pass laws to prevent *unjust* discrimination, is a recognition of the palpable fact that there may be discriminations which are not unjust, and by implication it restrains the power of the legislature to a prohibition of those which are unjust. That was undoubtedly the object of the legislature in passing the existing law. This is clearly shown by its title. But the act itself goes further. It forbids any discrimination whatever under any circumstances, and whether just or unjust, in the charges for transporting the same classes of freight over equal distances, even though moving in opposite directions, and does not permit the companies to show that the discrimination is not unjust. The mere proof of the discrimination makes out a case against the railway companies which they are not allowed to meet by evidence showing the reason or propriety of the discrimination, and then, upon this sort of *ex parte* trial, imposes, as a penalty for the offense, a forfeiture of the franchise, which would often be equivalent to a fine of millions of dollars. The object of the law is commendable, but such a proceeding, to

Chicago, &c. R. R. Co. v. People.

be followed by such a penalty for the first offense, cannot be sustained.

It could only have been authorized through the inadvertence of the legislature. The law, as it now stands, makes an offense out of an act which might be shown not to be an offense, but an exercise of a wise discretion, really beneficial to the people of the state, and while debarring the companies from all right of explanation, confiscates their franchises upon the first conviction. The legislature cannot raise a conclusive presumption of guilt against a natural person for an act that may be innocent in itself, taking from him the privilege of showing the actual innocence or propriety of the act, and confiscating his property as a penalty for the supposed offense. Those provisions of our constitution which forbid the deprivation of life, liberty, or property, except by due process of law, and which guarantee the right of trial by jury as heretofore enjoyed, and the right in all criminal prosecutions to appear and defend in person by counsel, would all be violated by such a law. These provisions, it is true, are designed to apply only to natural persons; but artificial persons must be permitted to invoke the spirit of justice which prompted them, so far as may be necessary to protect their property and franchises against the operation of a law that substantially condemns without a trial.

That the naked fact that a railway company charges a larger sum for transporting freight of the same class over a given distance than it is charging for the same distance over another part of its road, or in the opposite direction, is not of itself conclusive evidence of an unjust discrimination, will be manifest on a moment's consideration. Take, for instance, the road of the appellant, with one terminus at Chicago and the other at East St. Louis. At one season of the year more freights are moving from Chicago towards East St. Louis than in the opposite direction.

Chicago, &c. R. R. Co. v. People.

The consequence, of course, is that the supply of empty cars at the latter point will be in excess of the demand. There is a water-route between those points which also touches several intermediate stations upon the road. Now, unless the railway company is permitted under such circumstances to induce shipments over its line by lowering its freights, it is evident that a portion of its cars will return empty. This would, of course, necessitate a higher charge for freight moving towards St. Louis than it would be necessary to impose if return freights could be secured by lowering the rates on the return trip. To forbid the company to lower the rates of return freight would thus benefit no one, and would work an injury both to the company and the people along the line. At other seasons of the year the larger amount of freight is moving in the opposite direction, and then the operation must be reversed.

We give this illustration for the purpose of showing that a difference of price for the same distance of transportation is not necessarily an unjust discrimination, and that any law must be fatally defective which infers guilt as a conclusive presumption, from the mere fact of difference of rates, without permitting the companies to show why the different rates were adopted.

We may so far take judicial notice of the course of public affairs in this state, as to say that the real abuse which the legislature was understood by this act to prevent was not such proper discriminations as those we have just been supposing, but the practice which had become general among the railways of charging a higher compensation for carrying the agricultural products of the state to market, when shipped at a station where there was no competing line, than when shipped where there was such competition, although the distance over which the freight was carried in the latter case might greatly exceed the distance in the former.

Chicago, &c. R. R. Co. v. People.

The same system also prevailed in regard to the freight from Chicago to points in the interior, although probably not felt to be so great an evil. For discriminations of this character, when adopted as a system, we can certainly perceive neither justification nor excuse ; but, nevertheless, it is the right of a company, when prosecuted on the ground of unjust discrimination, to offer what evidence it can by way of explanation.

It might, for example, show in the present case, that the lumber shipped to Lexington had caused a greater expense in loading or unloading than to Bloomington. This may not be a very probable defense, but defenses may nevertheless exist, and if they do, the companies should not be deprived of the right to make them.

Before this act can be enforced, it should be so amended as to correspond with the requirements of the constitution by directing its prohibitions against *unjust* discriminations. It should make the charging of a greater compensation for a less distance, merely *prima facie* evidence of unjust discrimination, instead of conclusive evidence, as it now is ; and it should give to the railway companies the right of trial by jury, not only on the fact of discrimination, but upon the issue whether such discrimination is just or not.

There is another feature in this law to which we deem it our duty to advert. As the act now stands, a forfeiture of all franchises is the only penalty that can be imposed upon a company, in a prosecution instituted on behalf of the people, and it is imposed for the same offense. This, as already remarked, in some cases would amount to a fine of millions of dollars. Is not this a violation of the spirit of that constitutional provision which says, in terms, that "all penalties shall be proportioned to the nature of the offense?"

Is it not a violation of the spirit of the very clause of the constitution under which this act was framed,

Chicago, &c. R. R. Co. v. People.

and which requires the legislature to pass laws to prevent unjust discrimination and extortion by railroad corporations, "and enforce such laws by adequate penalties, to the extent, *if necessary for that purpose*, of forfeiture of their property and franchises?" Would it not be better to enforce the law by a series of considerable and increasing fines, before imposing the final penalty of forfeiture? A law admitting of but one penalty, and that of the harshest possible character, will necessarily be subjected by the courts to close criticism and a strict construction.

The English parliament passed a law in 1854 prohibiting the giving of undue or unreasonable preferences or advantages by railway companies in the management of their business. Under this act various cases have arisen in the English courts which have been cited by counsel. It is unnecessary to comment upon them. They hold, as we do, that a discrimination is not necessarily an unjust discrimination. That is to be determined upon the evidence.

The opinion of the court is, that while the legislature has an unquestionable power to prohibit unjust discrimination in railway freights, no prosecution can be maintained under the existing act until amended, because it does not prohibit unjust discrimination merely, but discrimination of any character, and because it does not allow the companies to explain the reason for the discrimination, but forfeits their franchises upon an arbitrary and conclusive presumption of guilt, to be drawn from the proof of an act that might be shown to be perfectly innocent. In these particulars the existing act violates the spirit of the constitution.

The judgment of the circuit court, ousting the appellant of its franchises, must therefore be reversed.

BY THE COURT.—Judgment reversed.

McDuffee v. Portland, &c. R. R.

McDUFFEE v. THE PORTLAND AND ROCHESTER RAILROAD.

52 *New Hampshire*, 480.

Supreme Court of New Hampshire; August Term,
1873.

Discriminations as to rates charged. At common law, a common carrier is bound, in the performance of his public service of transportation, not to make any unreasonable discrimination against any person in respect to terms, facilities, or accommodations; and a common carrier making such unreasonable discrimination is liable for the damage caused thereby.

The provisions of N. H. Gen. Stat. ch. 149, § 2, upon this subject, are merely declaratory of the common law.

Jurisdiction. A railroad company was incorporated by the legislatures of Maine and New Hampshire, and its road was located and operated in both those states. *Held*, that an action against the company for damages resulting from an unreasonable discrimination against the plaintiff in terms and accommodations, made by the company on that part of its road situated in Maine, could be maintained in New Hampshire.

This was an action upon the case for not furnishing to the plaintiff terms, facilities, and accommodations for his express business on the defendants' road between Rochester, New Hampshire, and Portland, Maine, reasonably equal to those furnished by the defendant to the Eastern Express Company.

The declaration, in the first count, alleged that the defendant railroad, owned and operated in New Hampshire, was engaged in carrying passengers and merchandise, and in transacting such other business as is usually transacted by railroads, to and from said

McDuffee v. Portland, &c. R. R.

Rochester, and Portland in Maine, and intermediate stations; and that the plaintiff was, on February 1, 1872, and to date of writ, an expressman, doing express business on said road, between said points, and by law entitled to have from said road reasonable and equal terms, facilities, and accommodations for the transportation of himself, his agents, servants, merchandise, and express matter over said road; but that the defendant did not furnish such terms, facilities, and accommodations to the plaintiff, and did furnish them to the Eastern Express Company and others, at a less rate than to the plaintiff for like transportation.

The second count set out the business of the defendant road and of the plaintiff, and the obligations of the road, and the rights of the plaintiff, the same as in the first count, and alleged that the defendant, combining and intending to injure the plaintiff in his business, neglected and refused to permit the plaintiff to have such terms, facilities, &c., and compelled the plaintiff to occupy, for the transportation of himself, servants, &c., and merchandise, &c., a baggage car on said road, which was inconveniently incumbered with baggage of passengers and otherwise; and that during all that time said Eastern Express Company, a corporation doing like business on said road, was furnished with reasonable terms and facilities for transportation, &c., on said road, at a less price than that paid by the plaintiff.

The third count set out the business of the defendant road and of the plaintiff the same as the first count, and alleged that the plaintiff was entitled to have reasonable terms and facilities, &c., and equal to those granted by said defendant to any party doing express business over said route; that the defendant, fraudulently, &c., pretended to the plaintiff that said Eastern Express Company were paying the defendant six dollars and thirty-nine cents per day for transportation of servants and express matter on same, and thereby in-

McDuffee v. Portland, &c. R. R.

duced the plaintiff to pay the same for like freights between the same points; yet said express company did not in fact pay more than fifty cents per day; and so the plaintiff averred that by fraudulent pretense the defendant cheated and deceived the plaintiff, and did not furnish to the plaintiff reasonable and equal terms, &c., for the transportation of himself, agents, servants, and merchandise, &c., as by the statutes of New Hampshire required.

The fourth count set out the business of the defendant over the same route, and the business of the plaintiff, as in the first count, and alleged that the defendant was required by law to grant to the plaintiff reasonable and equal facilities, &c., for transportation of himself, &c., merchandise, &c., over said road in his said express business; but that the defendant, conspiring and confederating with said Eastern Express Company to injure the plaintiff, did knowingly make an unlawful and corrupt bargain with said Eastern Express Company, wherein the said defendant agreed to give said express company the exclusive privilege of doing express business on said railroad, &c. And, in pursuance of said fraudulent and corrupt bargain, the defendant pretended that said express company were paying the defendant six dollars and thirty-nine cents per day for transportation, &c., and by said fraudulent pretense the defendant has exacted of the plaintiff six dollars and thirty-nine cents per day for transportation, &c.; and, in further pursuance of said corrupt bargain and conspiracy, the defendant has neglected and refused to grant the plaintiff the reasonable and equal terms, &c., to which he was by law entitled, nor equal to those granted said express company; and, in further pursuance of said corrupt bargain and conspiracy, forbid the plaintiff to exercise his business of expressman over said road, though the plaintiff demanded said equal terms, &c., and was ready to pay,

McDuffee v. Portland, &c. R. R.

and offered to pay, all reasonable and equal rates and charges therefor; but this count does not allege that the plaintiff was ready or willing, or offered to pay the same terms that the Eastern Express Company did.

A new count alleged that the defendant, at said Dover, February 1, 1872, and since to the date of the writ, was a railroad, operated in the state of New Hampshire, and was legally bound to transport all persons between the same points and stations on said road, at the same fare and rates, and was legally bound by the statute of the state of New Hampshire to transport and carry like descriptions of freight between the same points and stations of and on said road, for and at the same prices and rates; and to furnish all persons with reasonable and equal terms, facilities, and accommodations for the transportation of themselves, &c., substantially according to the terms of the statute, and set out the business of the plaintiff as in the other counts; and that the plaintiff was entitled to and needed and requested equal, &c., facilities, &c., for transportation of himself and his agents and servants, &c., and bundles, packages, messages, moneys, &c., as were furnished by the defendants to any and all other persons for like description of freight, &c., yet, though requested, the defendant did not furnish such accommodations to the plaintiff, his servants, &c., and express matter, but did furnish to the Eastern Express Company, having a station at Rochester, and doing like business with the plaintiff over said road, greater facilities, &c., than they furnished the plaintiff.

To this declaration the defendants demurred.

C. K. Sanborn, and Small, for the defendants.—This declaration is bad at common law. *Fitchburg R. Co. v. Gage*, 12 *Gray*, 393; *Oxlade v. N. E. R. Co.*, 40 *Law & Eq.* 234; *Ransome v. E. C. R. Co.*, 38 *Id.* 321; *Baxendale v. E. C. R. Co.*, 4 *C. & B. (N. S.)* 63;

McDuffee v. Portland, &c. R. R.

14 *U. S. Dig.* 85; *Elkins v. Railroad*, 23 *N. H.* 275; *Ang. & A. on Corp.* 123, §§ 124, 356; *Ollcott v. Banfill*, 4 *N. H.* 546; *Story on Bailm.* §§ 508, 549, n. 3; *Moses v. Railroad*, 24 *N. H.* 89-91; 2 *Redf. on Railways*, 95, § 7.

The declaration is bad under the statute of New Hampshire. And if the plaintiff relies upon the statute of Maine, he must plead and prove it. 1 *Chitty Pl.* 216; *Gould Pl.* ch. 3, § 16; *Stephen Pl.* 347; *Story Conf. Laws*; *Watson v. Walker*, 23 *N. H.* 471; *Pear-sall v. Dwight*, 2 *Mass.* 84; *Ferguson v. Clifford*, 37 *N. H.* 87.

Section 2 of chapter 149 of the New Hampshire General Statutes does not apply to expressmen.

The second and third counts do not aver any willingness to pay a reasonable, or any sum, for the transportation.

There is no allegation in the writ that the plaintiff was not allowed transportation, &c., upon equal terms with the public generally, carrying the same class of freight or engaged in the same business with himself, or that the usual terms were unjust or unreasonable; and the allegation, that he did not have terms equal with the Eastern Express, does not tend to show that he was not afforded the equal terms and facilities to which he was by law entitled, and, therefore, shows no damage or right of action. *Fitchburg R. R. Co. v. Gray*, 12 *Gray*, 399.

The position, that a corporation may be guilty of a conspiracy with intent to cheat, is unsound. 1 *Sharsw. Blacks.* 476, note 11; *State v. Great Works Co.*, 20 *Me.* 41.

The allegation that the defendants made the corrupt bargain set forth in the fourth count, giving the Eastern Express Company exclusive privileges over the railroad, must be construed with the other language of that count; and the whole count shows that the real

McDuffee v. Portland, &c. R. R.

grievance complained of is, that the Eastern company had better terms than the plaintiff.

Worcester & Gafney, and *Frank Hobbs*, for the plaintiff.

DOE, J.—A common carrier is a public carrier. He engages in a public employment, takes upon himself a public duty, and exercises a sort of public office. *Sanford v. R. Co.*, 14 *Pa. St.* 378, 381; *N. J. S. N. Co. v. Merchants' Bank*, 6 *How.* 344, 382; *Shelden v. Robinson*, 7 *N. H.* 157, 163, 164; *Gray v. Jackson*, 51 *Id.* 9, 10; *Ansell v. Waterhouse*, 2 *Chitty*, 1, 4; *Hollister v. Nowlen*, 19 *Wend.* 234, 239. He is under a legal obligation; others have a corresponding legal right. His duty being public, the correlative right is public. The public right is a common right, and a common right signifies a reasonably equal right. "There are certain cases, in which, if individuals dedicate their personal services, or the temporary use of their property, to the public, the law will impose certain duties upon them, and regulate their proceedings to a certain extent. Thus, a common carrier is bound by law, if he have conveniences for the purpose, to carry for a reasonable compensation." *Olcott v. Banfill*, 4 *N. H.* 537, 546. "He (the common carrier) holds a sort of official relation to the public. He is bound to carry at reasonable rates such commodities as are in his line of business, for all persons who offer them, as early as his means will allow. He cannot refuse to carry a proper article, tendered to him at a suitable time and place, on the offer of the usual reasonable compensation. *Story on Bailments*, § 508; *Riley v. Horne*, 5 *Bing.* 217, 224; *Bennett v. Dutton*, 10 *N. H.* 486. When he undertakes the business of a common carrier, he assumes this relation to the public, and he is not at liberty to decline the duties and responsibilities of his

McDuffee v. Portland, &c. R. R.

place, as they are defined and fixed by law." *Moses v. B. & M. R. R.*, 24 *N. H.* 71, 88, 89. On this ground, it was held, in that case, that a common carrier could not, by a public notice, discharge himself from the legal responsibility pertaining to his office, or from performing his duty in the way and on the terms prescribed by law.

"The very definition of a common carrier excludes the idea of the right to grant monopolies, or to give special and unequal preferences. It implies indifference as to whom they may serve, and an equal readiness to serve all who may apply, and in the order of their application." *N. E. Exp. Co. v. M. C. R. R. Co.*, 57 *Me.* 188, 196. A common carrier of passengers cannot exercise an unreasonable discrimination in carrying one and refusing to carry another. *Bennett v. Dutton*, 10 *N. H.* 481. A common carrier of freight cannot exercise an unreasonable discrimination in carrying for one and refusing to carry for another. He may be a common carrier of one kind of property, and not of another; but, as to goods of which he is a common carrier, he cannot discriminate unreasonably against any individual in the performance of the public duty which he assumed when he engaged in the occupation of carrying for all. His service would not be public, if, out of the persons and things in his line of business, he could arbitrarily select whom and what he would carry. Such a power of arbitrary selection would destroy the public character of his employment, and the rights which the public acquired when he volunteered in the public service of common carrier transportation. With such a power, he would be a carrier,—a special, private carrier, but not a common, public one. From the public service,—which he entered of his own accord,—he may retire, ceasing to be a common carrier, with or without the public consent, according to the law applicable to his case; but, as long as he remains in the

McDuffee v. Portland, &c. R. R.

service, he must perform the duties appertaining to it. The remedies for neglect or violation of duty in the civil service of the state are not the same as in the military service; but the public rights of having the duties of each performed are much the same, and, in the department now under consideration, ample remedies are not wanting. The right to the transportation service of a common carrier is a common as well as a public right, belonging to every individual as well as to the state. A right of conveyance, unreasonably and injuriously preferred and exclusive, and made so by a special contract of the common carrier, is not the common, public right, but a violation of it. And when an individual is specially injured by such a violation of the common right which he is entitled to enjoy, he may have redress in an action at common law. The common carrier has no cause to complain of his legal responsibility. It was for him to consider as well the duty as the profit of being a public servant, before embarking in that business. The profit could not be considered without taking the duty into account, for the rightful profit is the balance of compensation left after paying the expenses of performing the duty. And he knew beforehand, or ought to have known, that, if no profit should accrue, the performance of the duty would be none the less obligatory until he should be discharged from the public service. *Taylor v. Railway*, 48 *N. H.* 304, 317. The chances of profit and loss are his risks, being necessary incidents of his adventure, and for him to judge of before devoting his time, labor, care, skill, and capital to the service of the country. Profitable or unprofitable, his condition is that of one held to service, having, by his own act, of his own free will, submitted himself to that condition, and not having liberated himself nor been released from it.

A common carrier cannot directly exercise unreasonable discrimination as to whom and what he will carry.

McDuffee v. Portland, &c. R. R.

On what legal ground, can he exercise such discrimination indirectly? He cannot, with good reason, while carrying A., unconditionally refuse to carry B. On what legal ground can he, without good reason, while providing agreeable terms, facilities, and accommodations for the conveyance of A. and his goods, provide such disagreeable ones for B. that he is practically compelled to stay at home with his goods, deprived of his share of the common right of transportation? What legal principle, guaranteeing the common right against direct attack, sanctions its destruction by circuitous invasion? As no one can infringe the common right of travel and commercial intercourse over a public highway, on land or water, by making the way absolutely impassable, or rendering its passage unreasonably unpleasant, unhealthy, or unprofitable, so a common carrier cannot infringe the common right of common carriage, either by unreasonably refusing to carry one or all, for one or for all, or by imposing unreasonably unequal terms, facilities, or accommodations, which would practically amount to an embargo upon the travel or traffic of some disfavored individual. And, as all common carriers combined cannot, directly or indirectly, destroy or interrupt the common right by stopping their branch of the public service while they remain in that service, so neither all of them together, nor one alone, can, directly or indirectly, deprive any individual of his lawful enjoyment of the common right. Equality, in the sense of freedom from unreasonable discrimination, being of the very substance of the common right, an individual is deprived of his lawful enjoyment of the common right when he is subjected to unreasonable and injurious discrimination in respect to terms, facilities, or accommodations. That is not, in the ordinary legal sense, a public highway, in which one man is unreasonably privileged to use a convenient path, and another is unreasonably restricted to the gutter; and

McDuffee v. Portland, &c. R. R.

that is not a public service of common carriage, in which one enjoys an unreasonable preference or advantage, and another suffers an unreasonable prejudice or disadvantage. A denial of the entire right of service by a refusal to carry, differs, if at all, in degree only, and the amount of damage done, and not in the essential legal character of the act, from a denial of the right in part by an unreasonable discrimination in terms, facilities, or accommodations. Whether the denial is general by refusing to furnish any transportation whatever, or special by refusing to carry one person or his goods; whether it is direct by expressly refusing to carry, or indirect by imposing such unreasonable terms, facilities, or accommodations as render carriage undesirable; whether unreasonableness of terms, facilities, or accommodations operates as a total or a partial denial of the right; and whether the unreasonableness is in the intrinsic, individual nature of the terms, facilities, or accommodations, or in their discriminating, collective, and comparative character,—the right denied is one and the same common right, which would not be a right if it could be rightfully denied, and would not be common, in the legal sense, if it could be legally subjected to unreasonable discrimination, and parceled out among men in unreasonably superior and inferior grades at the behest of the servant from whom the service is due.

The commonness of the right necessarily implies an equality of right, in the sense of freedom from unreasonable discrimination; and any practical invasion of the common right by an unreasonable discrimination practiced by a carrier held to the common service, is insubordination and mutiny, for which he is liable, to the extent of the damage inflicted, in an action of case at common law. The question of reasonableness of price may be something more than the question of actual cost and value of service. If the actual value

McDuffee v. Portland, &c. R. R.

of certain transportation of one hundred barrels of flour, affording a reasonable profit to the carrier, is one hundred dollars; if, all the circumstances that ought to be considered being taken into account, that sum is the price which ought to be charged for that particular service; and if the carrier charges everybody that price for that service, there is no encroachment on the common right. But if, for that service, the carrier charges one flour merchant one hundred dollars, and another fifty dollars, the common right is as manifestly violated as if the latter were charged one hundred dollars, and the former two hundred. What kind of a common right of carriage would that be which the carrier could so administer as to unreasonably, capriciously, and despotically enrich one man and ruin another? If the service or price is unreasonable and injurious, the unreasonableness is equally actionable, whether it is in inequality, or in some other particular. A service or price that would otherwise be reasonable, may be made unreasonable by an unreasonable discrimination, because such a discrimination is a violation of the common right. There might be cases where persons complaining of such a violation would have no cause of action, because they would not be injured. There might be cases where the discrimination would be injurious: in such cases it would be actionable. There might be cases where the remedy by civil suit for damages at common law would be practically ineffectual on account of the difficulty of proving large damages, or the incompetence of a multiplicity of such suits to abate a continued grievance, or for other reasons: in such cases there would be a plain and adequate remedy, where there ought to be one, by the re-enforcing operation of an injunction, or by indictment, information, or other common, familiar, and appropriate course of law.

The common and equal right is to reasonable transportation service for a reasonable compensation.

McDuffee v. Portland, &c. R. R.

Neither the service nor the price is necessarily unreasonable because it is unequal, in a certain narrow, strict, and literal sense; but that is not a reasonable price, which is unreasonably unequal. The question is not merely whether the service or price is absolutely unequal, in the narrowest sense, but also whether the inequality is unreasonable and injurious. There may be acts of charity; there may be different prices for different kinds or amounts of service; there may be many differences of price and service, entirely consistent with the general principle of reasonable equality which distinguishes the duty of a common carrier in the legal sense, from the duty of a carrier who is not a common one in that sense. A certain inequality of terms, facilities, or accommodations may be reasonable, and required by the doctrine of reasonableness, and, therefore, not an infringement of the common right. It may be the duty of a common carrier of passengers to carry under discriminating restrictions, or to refuse to carry those who, by reason of their physical or mental condition, would injure, endanger, disturb, or annoy other passengers; and an analogous rule may be applicable to the common carriage of goods. Healthy passengers in a palatial car would not be provided with reasonable accommodations, if they were there unreasonably and negligently exposed, by the carrier, to the society of small-pox patients. Sober, quiet, moral, and sensitive travelers may have cause to complain of their accommodations, if they are unreasonably exposed to the companionship of unrestrained, intoxicated, noisy, profane, and abusive passengers, who may enjoy the discomfort they cast upon others. In one sense, both classes, carried together, might be provided with equal accommodation; in another sense, they would not. The feelings not corporal, and the decencies of progressive civilization, as well as physical life, health, and comfort, are entitled to reasonable accommodations.

McDuffee v. Portland, &c. R. R.

2 *Greenl. Ev.* § 222 a; *Bennett v. Dutton*, 10 *N. H.* 481, 846. Mental and moral sensibilities, unreasonably wounded, may be an actual cause of suffering, as plain as a broken limb; and if the injury is caused by unreasonableness of facilities or accommodations (which is synonymous with unreasonableness of service), it may be as plain a legal cause of action as any bodily hurt, commercial inconvenience, or pecuniary loss. To allow one passenger to be made uncomfortable by another committing an outrage, without physical violence, against the ordinary proprieties of life and the common sentiments of mankind, may be as clear a violation of the common right and as clear an actionable neglect of a common carrier's duty, as to permit one to occupy two seats while another stands in the aisle. Although reasonableness of service or price may require a reasonable discrimination, it does not tolerate an unreasonable one; and the law does not require a court or jury to waste time in a useless investigation of the question whether a proved injurious unreasonableness of service or price was in its intrinsic or in its discriminating quality. The main question is, not whether the unreasonableness was in this or in that, but whether there was unreasonableness, and whether it was injurious to the plaintiff.

This question may be made unnecessarily difficult by an indefiniteness, confusion, and obscurity of ideas that may arise when the public duty of a common carrier, and the correlative common right to his reasonable price, are not clearly and broadly distinguished from a matter of private charity. If A receives, as a charity, transportation service without price, or for less than a reasonable price, from B, who is a common carrier, A does not receive it as his enjoyment of the common right; B does not give it as a performance of his public duty; C, who is required to pay a reasonable price for a reasonable service, is not in-

McDuffee v. Portland, &c. R. R.

jured ; and the public, supplied with reasonable facilities and accommodations on reasonable terms, cannot complain that B is violating his public duty. There is, in such a case, no discrimination, reasonable or unreasonable, in that reasonable service for a reasonable price which is the common right. A person who is a common carrier may devote to the needy, in any necessary form of relief, all the reasonable profits of his business. He has the same right that any one else has to give money or goods or transportation to the poor. But it is neither his legal duty to be charitable at his own expense, nor his legal right to be charitable at the expense of those whose servant he is. If his reasonable compensation for certain carriage is one hundred dollars, and his just profit, not needed in his business, is one tenth of that sum, he has ten dollars which he may legally use for feeding the hungry, clothing the naked, or carrying those in poverty, to whom transportation is one of the necessities of life, and who suffer for lack of it. But if he charges the ten dollars to those who pay him for their transportation, if he charges them one hundred and ten dollars for one hundred dollars' worth of service, he is not benevolent himself, but he is undertaking to compel those to be benevolent who are entitled to his service ; he is violating the common right of reasonable terms, which cannot be increased by compulsory contributions for any charitable purpose. So, if he carries one or many for half the reasonable price, and reimburses himself by charging others more than the reasonable price, he is illegally administering, not his own, but other people's charity. And when he attempts to justify an instance of apparent discrimination on the ground of charity, it may be necessary to ascertain whose charity was dispensed,—whether it was his, or one forced by him from others, including the party complaining of it. But it will not be necessary to

McDuffee v. Portland, &c. R. R.

consider this point further until there is some reason to believe that what the plaintiff complains of is defended as an act of disinterested benevolence performed by the railroad at its own expense.

In *Garton v. B. & E. R. Co.*, 1 *B. & S.* 112, 154, 165, when it was not found that any unreasonable inequality had been made by the defendants to the detriment of the plaintiffs, it was held that a reasonable price paid by them was not made unreasonable by a less price paid by others—a proposition sufficiently plain, and expressed by CROMPTON, J., in another form, when he said to the plaintiffs' counsel during the argument of that case,—“The charging another person too little is not charging you too much.” The proposition takes it for granted that it has been settled that the price paid by the party complaining was reasonable,—a conclusion that settles the whole controversy as to that price. But before that conclusion is reached, it may be necessary to determine whether the receipt of a less price from another person was a matter of charity, or an unreasonable discrimination and a violation of the common right. Charging A less than B for the same service, or service of the same value, is not of itself necessarily charging A too little, or charging B too much; but it may be evidence tending to show that B is charged too much, either by being charged more than the actual value of the service, or by being made the victim of an unjustifiable discrimination. The doctrine of reasonableness is not to be overturned by a conclusive presumption that every inequality of price is the work of alms-giving, dictated by a motive of humanity. If an apparent discrimination turns out, on examination, to have been, not a discrimination in the performance of the public duty, but a private charity, there is an end of the case. But if an apparent discrimination is found to have been a real one, the ques-

McDuffee v. Portland, &c. R. R.

tion is whether it was reasonable, and, if unreasonable, whether the party complaining was injured by it.

In some cases, this may be an inquiry of some difficulty in each of its branches. But such difficulty as there may be will arise from the breadth of the inquiry, the intricate nature of the matter to be investigated, the circumstantial character of the evidence to be weighed, and the application of the legal rule to the facts, and not from any want of clearness or certainty in the general principle of the common law applicable to the subject. The difficulty will not be in the common law, and cannot be justly overcome by altering that law. The inquiry may sometimes be a broad one, but it will never be broader than the justice of the case requires. A narrow view that would be partial cannot be taken; a narrow test of right and wrong that would be grossly inequitable, cannot be adopted. If the doctrine of reasonableness is not the doctrine of justice, it is for him who is dissatisfied with it to show its injustice; if it is the doctrine of justice, it is for him to show the grounds of his discontent.

The decision in *N. E. Express Co. v. M. C. R. Co.*, 57 Me. 188, satisfactorily disposed of the argument, vigorously and ably pressed by the defendants in that case, that a railroad, carrying one expressman and his freight on passenger trains, on certain reasonable conditions, but under an agreement not to perform a like service for others, does not thereby hold itself out as a common carrier of expressmen and their freight on passenger trains, on similar conditions. So far as the common right of mere transportation is concerned, and without reference to the peculiar liability of a common carrier of goods as an insurer, such an arrangement would, necessarily and without hesitation, be found, by the court or the jury, to be an evasion. A railroad corporation carrying one expressman, and enabling him to do all the express business on the line of their

McDuffee v. Portland, &c. R. R.

road, do hold themselves out as common carriers of expresses; and when they unreasonably refuse, directly or indirectly, to carry any more public servants of that class, they perform this duty with illegal partiality. The legal principle, which establishes and secures the common right, being the perfection of reason, the right is not a mere nominal one, and is in no danger of being destroyed by a quibble. If there could possibly be a case in which the exclusive arrangement in favor of one expressman would not be an evasion of the common law right, the question might arise, whether, under our statute law (*Gen. Stat.* ch. 145, 146, 149, 150), public railroad corporations are not common carriers (at least to the extent of furnishing reasonable facilities and accommodations of transportation on reasonable terms) of such passengers and such freight as there is no good reason for their refusing to carry.

The public would seem to have reason to claim, that the clause of *Gen. Stat.* ch. 146, § 1,—“Railroads being designed for the public accommodation, like other highways, are public,”—is a very comprehensive provision; that public agents, taking private property for the public use, are bound to treat all alike (that is, without unreasonable preference), so far as the property is used, or its use is rightfully demanded, by the public for whose use it was taken; and that, in a country professing to base its institutions on the natural equality of men in respect to legal rights and remedies, it cannot be presumed that the legislature intended, in the charter of a common carrier, to grant an implied power to create monopolies in the express business, or in any other business, by undue and unreasonable discriminations. There would seem to be great doubt whether, upon any fair construction of general or special statutes, a common carrier, incorporated in this country, could be held to have received from the legislature the power

McDuffee v. Portland, &c. R. R.

of making unreasonable discriminations and creating monopolies, unless such power were conferred in very explicit terms. And, if such power were attempted to be conferred, there would be, in this state, a question of the constitutional authority of the legislature to convey a prerogative so hostile to the character of our institutions and the spirit of the organic law. But, resting the decision of this case, as we do, on the simple, elementary, and unrepealed principle of the common law, equally applicable to individuals and corporations, we have no occasion, at present, to go into these other inquiries.

We might have safely rested our opinion on the authority of *N. E. Express Co. v. M. C. R. R. Co.*, 57 *Me.* 188; *Sandford v. Railroad Co.*, 24 *Pa. St.* 378; *C. B. & Q. R. R. Co. v. Parks*, 18 *Ill.* 460, 464, and 2 *Redf. Am. R. R. Cas.* 71. But it seemed desirable that it should be distinctly founded on a general and fundamental principle, which does not need the support of and could hardly be shaken by decided cases. We have carefully examined *F. R. R. Co. v. Gage*, 12 *Gray*, 393, and have not overlooked the fact that, in England, it seems to be supposed that, at common law, common carriers are not bound to carry all and for all on reasonably equal terms. *Baxendale v. E. C. R. Co.*, 4 *C. B. (N. S.)* 63; *Branley v. S. E. R. Co.*, 12 *Id.* 63, 75. The position of the English law appears to be plain and instructive. The principal English cases usually cited are *Pickford v. G. J. R. Co.*, 10 *Mees. & W.* 399; *S. C. in equity*, 3 *Eng. Railw. & C. Cas.* 538; *Parker v. G. W. R. Co.*, 7 *Mann. & G.* 253; *Crouch v. L. & N. W. R. Co.*, 2 *Carr. & K.* 789; *Parker v. G. W. R. Co.*, 11 *C. B.* 545; *Edwards v. G. W. R. Co.*, *Id.* 588; *Crouch v. L. & N. W. R. Co.*, 14 *Id.* 255; *Crouch v. G. N. R. Co.*, 9 *W. H. & G.* 556; *Finnie v. G. & S. W. R.*, 2 *Macq. H. of L. Cas.* 177; *S. C.*, 34 *Eng. L. & Eq.* 11; *Crouch v. G. N. R. Co.*, 11 *H. & G.* 742; *Barker v. M.*

McDuffee v. Portland, &c. R. R.

R. Co., 18 *C. B.* 46; Parker v. G. W. R. Co., 6 *E. & B.* 77; Caterham R. Co. v. L. B. & S. C. R. Co., 1 *C. B.* (*N. S.*) 410; Barret v. G. N. R. Co., *Id.* 423; Ransome v. E. C. R. Co., *Id.* 437; Oxlade v. N. E. R. Co., *Id.* 454; Marriott v. L. & S. W. R. Co., *Id.* 499; Beadell v. E. C. R. Co., 2 *Id.* 509; Painter v. L. B. & S. C. R. Co., *Id.* 702; Baxendale v. N. D. R. Co., 3 *Id.* 324; Harris v. C. & W. R. Co., *Id.* 693; Jones v. E. C. R. Co., *Id.* 718; Baxendale v. E. C. R. Co., 4 *Id.* 63; Ransome v. E. C. R. Co., *Id.* 135; Cooper v. L. & S. W. R. Co., *Id.* 738; Piddington v. S. E. R. Co., 5 *Id.* 111; Baxendale v. G. W. R. Co., *Id.* 309; Baxendale v. G. W. R. Co., *Id.* 336; Nicholson v. G. W. R. Co., *Id.* 366; Garton v. G. W. R. Co., *Id.* 689; Garton v. B. & E. R. Co., 4 *H. & N.* 33; Garton v. B. & E. R. Co., 6 *C. B.* (*N. S.*) 639; Bennett v. M. S. & L. R. Co., *Id.* 707; Nicholson v. G. W. R. Co., 7 *Id.* 755; Ransome v. E. C. R. Co., 8 *Id.* 709; Garton v. B. & E. R. Co., 1 *B. & S.* 112; Baxendale v. B. & E. R. Co., 11 *C. B.* (*N. S.*) 787; Branley v. S. E. R. Co., 12 *Id.* 63; Baxendale v. L. & S. W. R. Co., *Id.* 758; Baxendale v. G. W. R. Co., 14 *Id.* 1; Baxendale v. G. W. R. Co., 16 *Id.* 137; Sutton v. G. W. R. Co., 3 *H. & C.* 800; Baxendale v. L. & S. W. R. Co., *L. R.* (1 *Exch.*) 137; S. C., 4 *H. & C.* 130; Palmer v. L. & S. W. R. Co., *L. R.* (1 *C. P.*) 588; West v. L. & N. W. R. Co., *L. R.* (5 *C. P.*) 622; Palmer v. L. B. & S. C. R. Co., *L. R.* (6 *C. P.*) 194; Parkinson v. G. W. R. Co., *Id.* 554.

These cases seem to be based on statutes general or special. The English parliament has been extremely vigilant and industrious in putting, in the charters of corporations, provisions for the protection of the rights of individuals and the public. Out of abundant caution, and for the information of those specially concerned, and to guard against any possible construction by implication repealing the common law, they affirmed some of its simplest rules. Sandford v. Railroad

McDuffee v. Portland, &c. R. R.

Co., 24 *Pa. St.* 378. In charters of common carriers, what is called the equality cause was inserted, requiring the carriers to furnish transportation on equal terms. The fashion of legislation, once set, was studiously followed with a degree of reverence for precedent that does not prevail in this country. General statutes were passed, enacting the common law doctrine of reasonable equality, and new methods of enforcing it were introduced. And the practice of the English courts, on charters and general acts of this kind, has been so long continued, that the fact seems now to be overlooked that the general principle of equality is the principle of the common law. With so much legislation on the subject as there has been in that country, and so much litigation upon acts of parliament, it was not strange that the bar and bench should finally lose sight of the common law origin of the principle so many times enacted in different forms, and carried out in different methods prescribed by parliament. It seems to have been a result of the anxiety of parliament, that, instead of merely providing such new remedies and modes of judicial procedure as they deemed necessary for the enforcement of the common law, they repeatedly re-enacted the common law, until it came to be supposed that, in such an important matter as the public service of transportation by common carriers, the public were indebted, for the doctrine of equal right, to the modern vigilance of parliament, instead of the system of legal reason which had been the birthright of Englishmen for many ages. A mistake of this kind is an evil of some magnitude. It unjustly weakens the confidence of the community in the wisdom and justice of the ancient system, and impairs its vigor. When the understanding prevails that equality, in a branch of the public service so vast as that of transportation by common carriers, depends upon the action of a legislature declaring it by statute, and attempting the difficult task

McDuffee v. Portland, &c. R. R.

of accurately expressing the whole length and breadth of the doctrine in words not defined in the common law, public and common rights of immense value are removed from a natural, broad, and firm foundation, to one that is artificial and narrow, and consequently less secure ; and many results of ill consequence flow from such a misconception of the free institutions of the common law.

English cases, based on statutes passed in affirmance of the common law, are precedents and authorities on the reasonableness of common carriers' discriminations that may be useful in this country. Even if it should be found that, in those cases, a question of fact is sometimes decided as a question of law, or that, in cases tried by the court without a jury, the distinction between law and fact is sometimes lost, the decisions may still, for some purposes, be of material value. But the common law rule of equal right and reasonableness is the ground on which we stand. "Common," in its legal sense, used as the description of the carrier and his duty and the correlative right of the public, contains the whole doctrine of the common law on the subject. The defendants are common carriers. That is all that need be said. All beyond that can be no more than an explanation or application of the legal meaning of "common" in that connection.

II. The views already stated necessarily lead to the opinion that the equality clause of section 2, chapter 149, *Gen. Stat.*, requiring that all persons shall have reasonable and equal terms, facilities, and accommodations for the transportation of themselves, their agents, and servants, and of any merchandise and other property, upon any railroad owned or operated in this state, and for the use of the depot and other buildings and grounds, is, so far as it has any application to the present posture of the case, merely declaratory of the common law, which, by section 3 of the same chapter,

McDuffee v. Portland, &c. R. R.

may be enforced by indictment as well as by suit for damages. Section 4 allows railroads to carry stockholders going to or returning from the meetings of the proprietors, persons in charge of mails and expresses, poor persons, and others, without payment of the regular fare. Poor persons, unable to pay the regular fare, may be relieved. As to them the common law is not changed. And the statute, construed by the reason of the common law which it affirms, might well be held to leave the matter of charity to the discretion of the carrier. And, as to matters of business—matters within the public duty of the carrier, and the common right of mankind—the statute, requiring reasonableness and equality in affirmance of the common law, is to be construed by the reason of the common law, and the whole statute is to be construed together. When section 2 says all persons shall have reasonable and equal terms, and section 4 allows expressmen and others to be carried without payment of the regular fare, both sections, taken together, do not allow any unreasonable discrimination between expressmen, or between any individuals or classes of the human race. The equality clause of the second section is the gist of the statute in relation to discrimination. Sections 4 and 5 are illustrations, showing, to a certain extent, the application of the common law doctrine of reasonable equality. In regard to the general doctrine, the statute, so far as it goes, is as broad and sweeping as the common law. The persons who are allowed, by section 4, to be carried without payment of the regular fare, can no more be made the subjects of an unreasonable discrimination than they could if that section were not in the statute. The fact that there may be a reasonable discrimination between wholesale and retail prices of transportation of passengers, as well as between wholesale and retail prices of lands or goods, seems to be recognized by section 5; but the Eastern Express Company, if they

McDuffee v. Portland, &c. R. R.

are such a company as their name indicates, are not one of the "other organized companies" alluded to in that section.

III. A part of the defendants' road is in Maine, and a part in New Hampshire. The defendants are, for ordinary practical purposes, one and the same corporation in each state, and are under the same common law obligations in each state. We know not how any individuals or corporations of New Hampshire can be aggrieved, in such cases as this, if the common law of both states is administered to them by the tribunals of Maine. If it was the opinion of the legislature or the judiciary of Maine that we ought not to take jurisdiction of the plaintiff's complaint of an unreasonable discrimination made by the defendants against the plaintiff on that part of the road situated in Maine, we should endeavor to give no just cause of offense, and to avoid all jurisdictional conflict. And, if it should be found that we had unwittingly encroached upon the sovereignty of another state, we should make haste to retrace our steps. But, as we understand the law of Maine, we are safe in holding that we may take jurisdiction of the whole of the case presented by the plaintiff, in an action at common law. Undoubtedly, on the question of discrimination practiced by the defendants in the performance of their duty in Maine, the rights of the parties are to be determined according to the law of that state. But, with the present system of continuous common carriage among our numerous states, if the remedy were cut in pieces by every state line, in cases of this kind, the evil consequences would be serious, and, as we think, without any legal necessity. Considering this point upon the general doctrine of transitory actions, the generally uniform liability of natural and artificial persons, and the intent of the legislatures of Maine and New Hampshire to create a corporation that might act, and be dealt with, as one and not two,

McDuffee v. Portland, &c. R. R.

in such matters as those involved in this suit, we see no room for doubt. *Angell & A. on Corp.*, §§ 402-407, 4th ed. ; *Libbey v. Hodgdon*, 9 *N. H.* 394 ; *Fuller v. C. & N. W. R. R. Co.*, 31 *Iowa*, 187 ; *Fuller v. C. & N. W. R. R. Co.*, *Id.* 211.

IV. The defendants contend that the declaration is bad at common law, because it is not alleged that the defendants were common carriers. It is not so alleged in terms ; probably it is so alleged in substance. The objection being one so easily obviated by an amendment alleging, in so many words, that the defendants were common carriers, the plaintiff, having his attention called to a possible motion in arrest of judgment, will undoubtedly guard against danger in that quarter, and avoid an unprofitable and uninteresting question of pleading, by making such an amendment. This being a case, in some respects, of novel impression in this state, the plaintiff's counsel, in drawing the declaration, very prudently referred to the statute, and inserted several counts of considerable length and elaboration. Since we hold that damage suffered by the plaintiff from an unreasonable discrimination made by the defendants between the plaintiff and the Eastern Express Company or any one else, in terms, facilities, or accommodations—damage caused by any undue or unreasonable preference or advantage made or given by the defendants, as common carriers, to or in favor of any particular person or company, or caused by any undue or unreasonable prejudice or disadvantage to which the defendants subjected the plaintiff—is a cause of action at common law, a good and sufficient count can easily be drawn for such a cause of action, without reference to the statute. It may be well to employ as much of the phraseology of the statute as possible, and it may not be strictly necessary to insert explicit allegations presenting the case in the exact legal form in which we have presented it, but the declaration should be made

Johnson v. Hudson River R. R. Co.

obviously and unquestionably sufficient. The suggestions we have made will enable counsel readily to put it in such form as to avoid every possible objection. Our time is too much needed for the consideration of subjects of some importance, to be properly occupied with an unnecessary and barren question of pleading.

BY THE COURT.—Case discharged.

JOHNSON v. THE HUDSON RIVER RAILROAD COMPANY.

49 *New York*, 455.

New York Court of Appeals; May Term, 1872.

Limitation of rates of fare. Construction of statutes. The act incorporating a company conferred upon it the power to fix, regulate, and receive charges for the transportation of passengers, not exceeding certain specified rates. A subsequent general railroad law enacted that "all existing railroad corporations within this state shall respectively have and possess all the powers and privileges contained in this act; and they shall be subject to all the duties, liabilities, and provisions not inconsistent with the provisions of their charters, contained in" certain sections specified. Corporations formed under the general law were allowed to regulate and receive fares within a higher limit than that fixed by the charter mentioned. *Held*, that this corporation could also fix and receive fares within the higher limit, without regard to the restriction of its charter. This was among the "powers and privileges" which were absolutely conferred. The words in the general act "not inconsistent with the provisions of their charters," could not be applied to the grant of powers and privileges.

Appeal to the court of appeals of New York from

Johnson v. Hudson River R. R. Co.

the general term of the superior court of the city of New York.

This was an action for penalties for exacting illegal fare, brought under the New York act "to prevent extortion by railroad companies." *N. Y. Laws of 1857, ch. 185.*

By the charter of the defendant corporation, it was restricted to a charge for way passengers of not exceeding two and a half cents per mile during four months of the year, — December, January, February, and March,—and two cents per mile during the remainder of the year. The plaintiff traveled almost daily over defendant's road from May 10, 1865, to May 9, 1866, a distance of little more than ten miles each way. During the four months mentioned he was charged and paid thirty cents fare, and during the remainder of the year twenty-five cents.

The statutory provisions bearing on the case are stated in the opinion.

Upon trial before a referee, he found that the fare charged was greater than was authorized, and that defendant was liable to a penalty of fifty dollars for each over-charge proved, and directed judgment for the plaintiff for the amount of the penalties and the excess of fare. Judgment was entered accordingly, and, upon appeal by the defendant, was affirmed by the general term. From the latter judgment the defendant appealed.

Charles O'Conor, for the appellant.

Where the language of an act is clear and explicit, the court has no power to give it a different effect. *Bidwell v. Whittaker*, 1 *Mann.* 479; *Pearce v. Atwood*, 13 *Mass.* 343.

To extend section 49 of the act of 1850 so as to involve excusable misinterpretations in vindictive pen-

Johnson v. Hudson River R. R. Co.

alties, would violate sound principles. 1 *Black. Com.* 88, subd. 4, Wendell's note, 40; *Fish v. Fisher*, 2 *Johns. Cas.* 90; *United States v. Cantrill*, 4 *Cranch*, 167; *The Enterprise*, 1 *Paine*, 33; *Commonwealth v. Macomber*, 3 *Mass.* 257; *Parry v. Croydon Gas Co.*, 15 *Com. Bench N. S.* 575.

E. M. Wight, for the respondent.

Defendant was limited by its charter to the rate of fare therein prescribed. This power was not extended by the general railroad acts. *Chase v. New York Central R. R. Co.*, 26 *N. Y.* 524; *Nellis v. New York Central R. R. Co.*, 30 *Id.* 513; *Dickson v. Hudson River R. R. Co.*, 12 *Id.* 314.

ALLEN, J.—The right of the defendant to demand and receive for the transportation of passengers a greater sum than that allowed by its act of incorporation, as modified in 1850, depends upon the interpretation of section 49 of the general railroad law of the same year, enacted some two months after the amendment of the charter referred to.

By the act incorporating the defendant, as modified by chapter 9 of the Laws of 1850, the "power and privilege" was conferred upon the corporation to fix, regulate, and receive tolls and charges for the transportation of passengers at rates for way-travel not exceeding two and a half cents per mile for each passenger and his ordinary baggage, during four months, and two cents during the residue of the year. *Laws of 1846*, p. 272; *Laws of 1850*, p. 14. The franchise or privilege was restricted and limited by the terms of the legislative grant, the restriction and limitation being a constituent part of the grant itself. There was no general privilege of regulating and demanding toll for the transportation of passengers, but the right was restricted within prescribed limits. The privilege was by its very terms of

Johnson v. Hudson River R. R. Co.

a limited and restricted character; a franchise limited, in its exercise, to the rates prescribed by the statute conferring it. It was a privilege of transporting passengers for hire at rates not exceeding those specified by the act. Similar privileges had been conferred by the legislature upon other railroad corporations, but never had the privilege been granted with the same restrictions. The privileges of this character enjoyed by other corporations were more liberal, and were not therefore the same. The power of demanding and receiving two cents per mile for a given service is of the same general character as that of demanding and receiving a larger sum for the same service, but it is not the same power.

Two bridge companies may each have the right to tolls, but if one is restricted to a toll of two cents for each passage while the other may receive a larger sum, or may regulate its own charges without limit, the privileges, the franchises and powers of the two are materially different in extent, description, and pecuniary value. Prior to 1850 the legislature had granted to the defendant the privilege of receiving one sum for the transportation of passengers, and to other like corporations the privilege of receiving a greater sum for the same service. Up to 1848, all railroad corporations were created by special acts of the legislature, the charter of each prescribing its special duties and privileges.

By the constitution of 1846, as well to place all corporations of the same character upon the same general footing, with uniform powers, privileges, and duties, as to obviate the necessity of much special legislation, corporations were authorized to be formed under general laws, and the creation of any, except for municipal purposes, and in cases where the objects of the corporation could not in the judgment of the legislature be attained under the general laws, was pro-

Johnson v. Hudson River R. R. Co.

hibited. *Const.* art. 8, § 1. One design was, that all that desired to transact business in a corporate capacity might do so upon an equality, and with equal privileges and liabilities, with uniform powers, and under uniform restraints. Equality between corporations themselves, as well as equality between corporations and individual citizens, so far as the latter was practicable, was in the minds of the convention in framing this part of the constitution.

Not only was the policy of equality of privilege among corporations of the same class and general character, including municipal corporations, advocated, but uniform restrictions upon and liabilities of all corporations urged by some who took part in the debate of the convention.

The first general act for the formation of railroad corporations, pursuant to this constitutional requirement, was passed March 27, 1848. *Laws of 1848*, p. 221. By subdivision 10 of section 19, corporations formed under the act were permitted to regulate the tolls and compensation for the transportation of passengers at rates not exceeding three cents per mile, except as otherwise provided by special act of the legislature. In the amendment of this act in 1850, the exception was stricken out and the limit to the amount made absolute, and perfect equality between corporations organized under its provisions secured. *Laws of 1850*, ch. 140, § 28, subd. 9. By section 46 of the act of 1848, it was enacted, that "all existing railroad corporations within this state shall respectively have and possess all the powers and privileges, and be subject to all the duties, liabilities, and provisions contained in this act, so far as they shall be applicable to their present conditions, and not inconsistent with the several charters." The legislature, lest this grant of privilege should exempt certain existing corporations from the payment of canal tolls upon freight, imposed by chapter 270 of the

Johnson v. Hudson River R. R. Co.

Laws of 1847, expressly provided in the same section that it should not operate to effect such exemption. The general railroad act of 1848 was revised, materially amended and modified, and re-enacted in 1850, chapter 140. By subdivision 8 of section 28 of the revised act, power was given to the corporations formed under it to regulate the compensation to be paid them for transportation of passengers, at not to exceed three cents per mile.

Section 46 of the act of 1848, in a substantially new form, became section 49 of the act of 1850. The section, as amended, reads as follows: "All existing railroad corporations within this state shall respectively have and possess all the powers and privileges contained in this act; and they shall be subject to all the duties, liabilities, and provisions not inconsistent with the provisions of their charter, contained in sections 9, &c. (naming thirteen sections, and excepting subd. 9 of § 28), of this act."

The language of the section is chosen with discrimination, and an evident distinction made between benefits conferred and obligations imposed.

In respect to powers and privileges, which are favors granted, they may be accepted and exercised or rejected, at the option of the corporations to which they are tendered, and therefore all the powers and privileges contained in the act, without distinction or discrimination, are conferred upon corporations then existing, whether created by special charter or formed under the general act of 1848. By this provision a perfect equality and uniformity in the matter of powers and privileges between all the railroad corporations of the state was accomplished, except in respect to a few having by their charters special privileges, and all had the same rights. But as to the duties, liabilities, and like subjective provisions of the act, respect was had to existing charters, and no privileges, specially

granted, were taken away. No duties, liabilities, or burdens were imposed upon existing corporations except such as were contained in certain sections of the act, and were not inconsistent with their respective charters. The charters were regarded as *quasi* contracts with the several corporations, and if by reason of a right reserved they might be constitutionally amended or repealed, the legislature were careful not to do so in this general act in a way to change the condition of the company for the worse. Hence, all powers and privileges were absolutely conferred irrespective of charter provisions, and certain duties and liabilities, so far as they were not inconsistent with the chartered rights and privileges, were imposed. The section is so framed, and the whole sentence is so constructed, that the phrase "not inconsistent with the provisions of their charter," cannot be imported into and made a part of the clause granting powers and privileges, by any allowable process of interpretation. It certainly does not belong there grammatically. It would be equally admissible to interpolate for the purpose of enumerating and limiting the privileges conferred, the sections specifically referred to as prescribing the duties imposed. The words employed in the two branches of the section are also significant. The word "possess" is proper and expressive, as used in the bestowment of rights or benefits, and the word "subject" is alike proper in imposing liabilities or an obligation to obey some law or perform some duty. There is and can be no inconsistency between a charter provision and a subsequent act enlarging the powers and extending the franchise of a corporation. Enlarged powers are not inconsistent with lesser powers; the lesser may be included or merged in the greater, but the two are not inconsistent, and it is by no means material whether the enlargement of the franchise, the additional power conferred, consists in the grant of an

Johnson v. Hudson River R. R. Co.

entirely new power or right, or the removal of some restriction or limitation attached to the exercise of a power or right originally conferred. In either case a power or privilege is conferred, a franchise granted, which the corporation did not before possess. If banks created by special charter were prohibited from discounting bills having more than thirty days to run, or at a greater rate of interest or discount than five per cent. per annum, and a general law should be enacted providing for the incorporation of banking corporations with authority to discount bills without limit as to time and at a greater rate of interest or discount, and the same act should declare that all existing banking corporations should possess the same powers and privileges as were conferred by the act upon corporations formed under it, there would be but little hesitation in declaring that the effect would be to remove the restriction and limitation of the charters as to the character of the bills that might be discounted and the rate of interest that might be taken. So long as restrictions and limitations were imposed upon one class of corporations that were removed from or were never imposed upon the others, the powers and privileges possessed by each were not the same. The legislature, by declaring in the comprehensive language of the act that the corporations then existing should possess all the powers and privileges conferred upon corporations formed under the act, clearly intended that they should possess and enjoy not only the like privileges, privileges of the same character, but privileges and powers the same in character, measure, and extent. Had they intended anything less than this, they would have so said, as they did, in terms, in respect to tolls upon freight carried by certain of the railroad corporations.

If the legislature designed to continue the restrictions and limitations of the powers of existing corporations imposed by their charters, which were not imposed

Johnson v. Hudson River R. R. Co.

upon corporations formed under the act, or to withhold from them powers conferred upon corporations to be formed, they should have so said. It is not for the court, acting upon conjecture and surmising what may have been the intent of the legislature, to interpolate exceptions in the statute, thus in effect avoiding and nullifying the express declaration of the legislature, that these two classes of corporations shall possess the same powers and privileges.

By the provision, existing corporations were put in possession of all the powers and privileges "contained in the act," and made subject, that is, required and bound to perform the duties, discharge the liabilities, and obey the provisions contained in certain sections of the act, and which were not inconsistent with their charters.

The section, for all the purposes of this action, should be read and interpreted as if it had ended with the first clause, and no reference had been made to liabilities or duties. So read, the statute is unambiguous and in no need of interpretation. The language of the act being explicit, and the words free from ambiguity and doubt, capable of being read and understood, expressing plainly and distinctly the sense of the framers of the act, there is no occasion to resort to other means of interpretation. Where the language is definite and has a precise meaning, it must be presumed to declare the intent of the legislature, and it is not allowable to go elsewhere in search of conjecture to restrict or extend the meaning. *McCluskey v. Cromwell*, 11 *N. Y.* [1 *Kern.*] 593, and cases cited. The provision here is clear and precise, and courts cannot go beyond or outside of it under pretext of interpretation to cure any supposed blunder of the legislature. *Clarkson v. Hudson River R. R. Co.*, 12 *N. Y.* [2 *Kern.*] 304, was decided upon the ground that powers and privileges conferred by the act of 1850 upon existing

Johnson v. Hudson River R. R. Co.

corporations were in the nature of benefits, which the companies might or might not accept at their option, and that consequently they were not bound to avail themselves of the provisions of the general act in the acquisition of lands, and is in harmony with the views now expressed.

By the charter of the defendant it had power to regulate its passenger fare within the limits of two and a half cents per mile; corporations formed under the general railroad act have the power to regulate passenger fares up to three cents per mile. All the powers possessed by the latter class of corporations, by the terms of the act, are possessed by the defendant; and when the act says "all the powers," it means all the powers without restriction or limitation other than those prescribed by the act itself. It follows that the defendant had the right to ask and receive toll and compensation for the transportation of passengers to the extent allowed by the general railroad act, and incurred no penalty for demanding toll and compensation in excess of the charter limit, but not in excess of the limit named in the general act.

This seems to have been the legislative interpretation of the clause from the very cautious provision of the act of 1848, saving from its operation and effect the act of 1847, imposing tolls on freight carried by certain railroads, and the great precision and care exercised in saving corporations created by special charter having right to receive for the carriage of passengers more than three cents per mile, from the restrictive operations of subdivision 9 of section 28 of the act. It did not subject corporations possessing by their charters more liberal powers to the restrictive operation of the act. The act was benign toward corporations possessing under their charters less power than was conferred by it upon corporations to be formed under it, by placing both upon the same footing, and was just toward those

Peoria, &c. R. R. Co. v. Coal Valley Mining Co.

having greater powers, by not subjecting them to its provisions, and thereby diminishing the value of their franchises. The act is not incongruous or inharmonious as thus read. The sections to the provisions of which the existing corporations are made subject, all contain provisions and regulations of more or less importance, to be observed and obeyed by the corporations affected by them, and no part of the section is without meaning or force.

The judgment should be reversed and a new trial granted; costs to abide the event.

All concur, except CHURCH, Ch. J., and RAPALLO, J.

CHURCH, Ch. J., dissented.

RAPALLO, J., did not sit.

By the COURT.—Judgment reversed.

THE PEORIA AND ROCK ISLAND RAILROAD
COMPANY v. THE COAL VALLEY
MINING COMPANY.

Supreme Court of Illinois; February Term, 1878

Injunction. Contract for use of railroad. An injunction should not be granted to restrain the transportation by a railroad of the property of individuals, because the railroad company has failed to make the payments stipulated in a contract entered into by such company for the use of another road in carrying passengers and goods. The interest of the public in the use and continued operation of railroads forbids the courts to afford such relief for a violation of the contract, and the parties must be left to their remedy by an action at law.

Peoria, &c. R. R. Co. v. Coal Valley Mining Co.

Obligation to receive and carry passengers and goods. Railroad companies, as common carriers, owe the duty of transporting passengers and property to any and all persons who require the performance of such service. They cannot, by contract with one another, disable themselves from performing the duty imposed; and any contract purporting to do so is *ultra vires*, so far as the public are concerned.

Consolidation. A statute empowering railroad companies to consolidate their lines and to make leases and running arrangements on such terms as they may agree, does not confer upon such companies the power, by contract with each other in consolidating their roads and franchises, to absolve themselves from their duties as common carriers, simply by binding each other not to observe the requirements of the law.

Appeal to the supreme court of Illinois from the circuit court of Whiteside county.

This was a suit in equity to compel performance of a contract between the parties, and to enjoin a breach of the contract, and for an accounting. A demurrer was filed to the bill, but was overruled; and a decree was rendered for a perpetual injunction. The facts of the case and the questions involved are stated in the opinion.

The suit was originally commenced in the circuit court of Rock Island county, but was afterwards transferred by a change of venue to the circuit court of Whiteside county. From the decree, as above stated, rendered by the latter court, the defendant appealed.

WALKER, J.—This was a bill in chancery filed by the appellee, in the Rock Island circuit court, against appellants, to compel them to perform a contract, and to enjoin a breach of the same. The bill alleges that the Coal Mining Company was incorporated in 1856 for the purpose of mining and transporting coal from Coal Valley to Rock Island and other points. Its powers were increased by the general assembly in 1865, and it was then authorized to acquire title to so much of

Peoria, &c. R. R. Co. v. Coal Valley Mining Co.

the Rock Island & Peoria Railroad as was then completed, extending from Rock Island to Coal Valley. It is further alleged, that the Rock Island & Peoria Railroad Company was incorporated in 1855, with power to construct a railroad from Rock Island to Peoria, and did construct a railroad from Rock Island to Coal Valley, and issued one hundred and fifty bonds, for one thousand dollars each, and mortgaged the road, its property and franchises, to secure the payment of the same. It is further charged, that appellee acquired title to the Rock Island & Peoria Railroad Company, subject to the mortgage on the road given to secure the one hundred and fifty thousand dollars of bonds it had issued prior to 1869. Appellee purchased these bonds, and a large amount of floating indebtedness and nearly all the stock of the road, all of which was in the hands of P. L. Cable. But before this was all accomplished, the Peoria & Rock Island Railroad Company had been incorporated and authorized to construct a railroad from Peoria to Rock Island. That on September 4, 1869, a contract was entered into by appellee with the Rock Island & Peoria Railroad Company. That agreement, among other provisions, contained this: "And the said party of the first part for itself, its successors and assigns, hereby agrees to pay said party of the second part, the sum of ten thousand and five hundred dollars per annum, as interest on the sum due said party of the second part, on account of the surrender of said stock and said coupons, and the release of said claims, which sum shall only be payable in track service, for the transportation of coal over the said road in Rock Island county, at the rate of one cent and a quarter per ton, per mile, always computing the distance as twelve miles, thus making the rate fifteen cents per ton for the use of the track, whether transported that distance or not; and in consideration that the said party of the second part agrees

Peoria, &c. R. R. Co. v. Coal Valley Mining Co.

to accept the right to transport seventy thousand tons of coal during each and every year over the road as aforesaid, with its own motive power and rolling stock, in full satisfaction of said sum of ten thousand and five hundred dollars, whether it transports that amount or not, and on or before January 10 of each year to pay said party of the first part for any excess it may transport over said seventy thousand tons in or during the year then next preceding, at the rate of fifteen cents per ton; it is hereby agreed that said party of the first part, its successors and assigns, shall pay said party of the second part fifty cents per ton on all the coal transported by any party except said party of the second part over said railroad to the north side of Rock river or over the bridges which said party of the first part may use in crossing said river, which fifty cents per ton the said party of the second part shall be entitled to, to make up any deficit which may have occurred, or may hereafter occur, in the seventy thousand tons aforesaid." "Payment for all the coal so transported during each month shall be made by said party of the first part, its successors or assigns, to said party of the second part, within ten days of the expiration of said month, and if said party of the first part, its successors or assigns, shall fail to pay the same within the above limited time, the right of any and all parties, except said party of the second part, to transport coal over said road to the north side of Rock river, or over said bridges, shall cease and become exclusive in said party of the second part, and so remain until said payment is made—*it being the object and intention of this contract to give no party, except said party of the second part, any right to transport coal over said road to the north side of Rock river, or over said bridges, only when there is nothing due under this provision to said party of the second part.* And the said party of the second part hereby agrees to perform all the

Peoria, &c. R. R. Co. v. Coal Valley Mining Co.

duties which said party of the first part, its successors or assigns, may owe to the public, so far as the transportation of coal is concerned, between Coal Valley and Rock Island, and all intervening points, charging such rates therefor as it reasonably and lawfully may, and all coal which said party of the first part, its successors or assigns, may bring to Coal Valley, designed for Rock Island and intervening points, the said party of the second part will at all times promptly transport, at such rates as it may reasonably and lawfully charge therefor." The bill further alleges that, subsequently, the Rock Island & Peoria Railroad Company consolidated with the Peoria & Rock Island Railway Company, and the consolidated company became and is the company made defendant to the bill, and it assumes the contract of September 4, 1869, between appellee and the Rock Island & Peoria Railroad Company, and entered into a contract binding themselves thereto. That appellant had been and is engaged in carrying coal over their road and refuses to pay fifty cents per ton as agreed. The bill charges that appellants are insolvent. It also alleges that the Rockford, Rock Island, & St. Louis Railroad Company had entered into a contract with appellee in all material respects similar to that made with the Rock Island & Peoria Railroad Company, who were using the track, switches, side track, and lateral lines of appellees at Coal Valley, and that company is made a party to the bill. The bill prays that appellants be compelled to keep and perform their contract, and be restrained from using the side tracks, switches, and lateral lines at Coal Valley, and to enjoin appellants and their officers from transporting any coal over their road to the north side of Rock river, or over the bridges which the companies use in crossing the river, until appellants shall account and pay fifty cents a ton for all coal they had transported by each of the roads, and from transporting coal as

Peoria, &c. R. R. Co. v. Coal Valley Mining Co.

aforesaid unless they account and pay fifty cents per ton for all coal they had transported by each of the roads, and from transporting coal as aforesaid unless they shall account for the same at the times stipulated. Also to require the company to account for and pay appellee, who claims the ownership of the switches, side tracks, and lateral lines, a reasonable sum for the use of the same. Before the hearing on the demurrer the venue was changed to the circuit court of Whiteside county.

To this bill appellant filed a demurrer and assigned as grounds, that the Peoria & Rock Island Railway Company had no power to make such a contract, and that it was void. That the company had no right or power to bind themselves for the payment of fifty cents a ton on coal transported over the road, as such contract is against public policy and is void. On the hearing in the court below the demurrer was overruled, and a decree rendered making the temporary injunction perpetual, and the case is brought to this court by appeal. The question presented is, whether a court of chancery will restrain these companies from carrying coal as freight for individuals because appellants have agreed to pay appellee fifty cents for each ton so carried, and for which appellants refuse to pay, at that rate. In such a contract *ultra vires*, and against public policy? We think not. The act of the general assembly, under which these consolidations and contracts were made, is quite broad and comprehensive. It is apparent from their charter, that the Coal Valley Mining Company, when it purchased this Rock Island railroad, became and was a public railroad company, entitled to the rights, privileges, and powers conferred by its charter. It is conceded that the Mining Company was, before the consolidation, a carrier of passengers and freights between Rock Island and Coal Valley, and both companies reserved that right when the consolidation was formed, and they had been, and were

Peoria, &c. R. R. Co. v. Coal Valley Mining Co.

still, exercising these rights. We have no doubt that each of these companies had ample power under the general law of the state, authorizing railroad companies to make running arrangements with each other, and to consolidate their roads on such terms as they may agree. And so far as we see, these companies did make a valid and binding consolidation. But, conceding this all to be true, will a court of equity afford relief in the mode sought in this case? In other words, have not the public such an interest in the use and continued operations of the railroads of the state, as should forbid the court from enjoining the freights and property of individuals from being transported because the company has entered into an engagement to pay a stipulated sum for track service, or toll, for the right to run over another road, and carry passengers and freights, or should the chancellor leave the parties to seek their remedy by an action at law on the contract? When these great and useful bodies were created there were two considerations that induced their organization. One was, and it was the highest and most important, the accommodation of the public, and the promotion of their interest. The other was the promotion of the individual stockholders in such companies. The primary object of the people of the state ever has been in creating railroads to afford facilities for trade and commerce, by speedy, convenient, and cheap transportation of merchandise, the product and the minerals of the country, to the best market, thus supplying every section with the products of other sections. They were needed and adapted to ready and rapid exchange of commodities, and the rapid development of the resources of the country, and have from an early period after their introduction been known and regarded as the greatest of all the means employed by our civilization in advancing the trade and commerce of our country. And they have fulfilled the anticipations of our

Peoria, &c. R. R. Co. v. Coal Valley Mining Co.

people in this regard. It was such considerations as these, at an early day in the history of our state, that induced our people to enter upon a grand but disastrous system of internal improvements. By it an effort was made, at the expense of the state, to construct railroads traversing its entire limits in every direction, and passing through almost every county in its borders. In the effort many millions were expended: the system failed, entailing a debt that almost bankrupted the people, and entailed on them a depressing burden that they have not yet wholly extinguished. And it was the same considerations that have induced almost every county, city, town, village, and a great number of townships, to incur debts, which in the aggregate amount to a vast sum, to subscribe for stock in railroads, or as donations to such bodies, and on which these corporations are paying an immense sum in taxes to discharge the interest on these debts. And for all this vast sum contributed it is believed that cities, counties, towns, villages, and townships have nothing of value to show, unless it be in rare instances. No one can believe that the people have expended these vast sums, burdened themselves in many instances to the point of ruin, and entailed upon themselves and posterity debt and burdens that must be onerous if not destructive, for the benefit of the private stockholders of these companies. No one can entertain such an opinion. All must comprehend the fact that it was done mainly to promote the public good and to advance our material interests. Can any one suppose that it was merely to enrich and aggrandize the stockholders and the officers of these companies that the people, through their representatives in the general assembly, have granted such liberal charters, authorizing them to use the highest prerogative of sovereignty, eminent domain, to deprive the citizen of his property for the use and benefit of these bodies, thus relieving them of the

Peoria, &c. R. R. Co. v. Coal Valley Mining Co.

necessity of being compelled to pay exorbitant prices for their right of way, depot grounds, and materials for the construction of their roads? On the contrary, all know that such liability, and the grant of such powers, were conferred to advance public interest as the first and great object. But, to accomplish this great purpose, it was found necessary to enlist private enterprise and capital. And to call it forth for the accomplishment of the end, rights, privileges, and immunities had to be conferred and secured to those who would embark in the construction and operation of these roads. Hence, in their charters, the rights and duties of the companies are either expressed or implied. When created bodies corporate, they become invested with the right to construct and use their roads; to transport both persons and property over their lines, and to receive compensation for the same. And when these bodies accept their charters, it is with the implied understanding that they will fairly perform the duties of public common carriers of both persons and property. And, at the same time, a correlative duty is imposed, that they shall receive and carry persons and freight on their lines; and this is a duty they cannot escape by refusal by contract or agreement with other persons or companies that they will disregard and refuse to perform them.

These are duties they owe the public, and it was in consideration that they would be performed that this charter was granted. They then have no power to disable themselves from performing these charter obligations, and any effort to do so by contract is void. We are not prepared to hold that the legislature could exonerate such bodies from the performance of these duties. While railroads must be protected in all their rights, with the same exactness that individuals are, they must at the same time be held to a rigid performance of all their duties to the public. Nor will they

Peoria, &c. R. R. Co. v. Coal Valley Mining Co

be permitted, by contract or otherwise, to avoid their performance.

The roads who are litigating in this case, as common carriers, owe the duty of transporting passengers and property for any and all persons who require the performance of the service, and coal is a kind of property suitable and proper to be carried over their several roads, and they must carry it, as they do any other freight, for all persons who bring it to their roads for the purpose, on the same terms as they do other like freights, similar in bulk and weight, and it is their duty to provide, as common carriers, all reasonable facilities for its transportation. Nor can these companies, by contract with each other, prevent themselves from performing the duty imposed by their respective charters. If they have so bound themselves, the contract is *ultra vires* so far as the public are concerned. Whether such a contract may be held valid and binding as between themselves when a suit at law shall be brought to recover the price agreed to be paid is not now before the court, and we refrain from its decision until it shall be properly presented.

It is earnestly urged that the law empowering railroad companies to consolidate their lines and to make leases and running arrangements, authorizes them to do so on such terms as they may agree; and that, the power being general, this contract does not contravene its provisions. The power is, no doubt, general to the extent that they are capable of contracting; but it must be understood that it is with that limitation that it is general. The general assembly never could have intended to confer power upon these bodies, by contract with each other in consolidating their roads and franchises, to absolve themselves from any duty they were under as common carriers, simply by binding each other not to observe such requirements. And that is what this contract does. Hence a court of equity has

Nelson v. Hudson River R. R. Co.

no power to enjoin these companies from performing this duty to the public. The decree of the court below must be reversed.

BY THE COURT.—Decree reversed.

NELSON v. THE HUDSON RIVER RAILROAD
COMPANY.

48 *New York*, 498.

Commission of Appeals of New York; May Term,
1872.

Consignor as agent for consignee. Special contract for transportation.

The general rule that the agent to whom the owner intrusts goods for delivery to a carrier must be regarded as having authority to stipulate for the terms of transportation, extends to the case of a consignor of goods to a distant consignee, the owner. Under such circumstances, the consignor is the agent of the consignee for the purpose of shipping, and, as such, authorized to contract with the carrier as to the terms of transportation.

As an authority to deliver goods for transportation can only be executed by obtaining the consent of the carrier to receive them, the agent to deliver must be deemed authorized to make a special contract limiting the liability of a common carrier who receives the goods.

The plaintiff, having purchased a large mirror from K., W. & Co., directed them to deliver it to the defendant, a railway company, for transportation to a specified point. K., W. & Co. sent a cartman to defendant's depot with the mirror, but defendant's agent declined to receive it unless the cartman would sign a contract relative to the terms of transportation. This contract contained a release of the defendant from damage by breakage, &c., not caused by defendant's negligence, in consideration of its agreeing to carry at tariff rates. Another clause required any objection to the contract to be notified to the defendant before the property was shipped,

Nelson v. Hudson River R. R. Co.

that a new contract might be made. The cartman signed the contract as agent for shipper and owner. It was also agreed between him and defendant's agent that the mirror should be retained until the next day, and should then be returned to the shippers if they requested. These facts were made known by the cartman to K., W. & Co., and a duplicate of the contract delivered to them. On the next day, no request to return or dissent from the agreement having been made by them, the mirror was forwarded. In an action for damages to the owner from the breaking of the mirror while in defendant's charge, and in course of transportation,—*Held*, that K., W. & Co. were authorized to make the contract on behalf of the plaintiff; that they could depute the cartman to make it for them; that there was a complete ratification of his acts; and that the contract made by him was valid and binding upon plaintiff.

Appeal to the commission of appeals of New York from the general term of the supreme court in the fifth judicial district.

This was an action for damages to a mirror owned by plaintiff, injured while being transported over defendant's railroad. The case was submitted to the court without a jury upon the following agreed statement of facts :

Defendant was, at the time mentioned in the complaint, and for a long time previous thereto, accustomed to refuse to receive or carry, at its ordinary tariff rates, large mirrors and other articles too bulky to be carried in covered cars, and for that reason liable to extra hazards, unless the shippers would execute and deliver to them a release of liability in respect thereto, which custom was well known to Kimball, Whittemore, & Co., and to Luke Greehey, but was not known to the plaintiff. Prior to February 14, 1863, the plaintiff purchased of Kimball, Whittemore & Co. a plate mirror and frame, for which he paid to them one hundred and ninety-five dollars, and for boxing and shipping the same, five dollars, being in all two hundred dollars, which was at the time the value thereof, and directed

Nelson v. Hudson River R. R. Co.

that the same be well packed in a box, and delivered in good order to the Hudson River Railroad Company for transportation by railroad to Fulton, N. Y., but gave the said Kimball, Whittemore, & Co. no other authority to contract with the carrier, or to execute the release, of which schedule "A" is a copy.

On February 14, 1863, the said property was delivered by Kimball, Whittemore, & Co. to Luke Greehey, a cartman, with directions to take the said goods to the depot of defendant, and there to ship the same, the said Kimball, Whittemore, & Co. not knowing that the package was too bulky to be carried in a covered car.

Greehey carried the same to the depot, and there offered the same for transportation to one Jerome Buel, an authorized receiving agent of the defendant. It was, in fact, too bulky to be carried in a covered car, and Buel refused to receive the same unless Greehey would first sign the release, a copy of which is hereto annexed marked "Exhibit A," whereupon Greehey signed the said release, and delivered the same to Buel, and Buel then received the said goods for transportation by defendant, and signed and delivered to said Luke Greehey a receipt therefor.

A duplicate copy of Exhibit A was at the same time signed by Buel and Greehey, and taken by Greehey to give to Kimball, Whittemore, & Co., and it was agreed that the box should be retained in defendant's depot till the next day, and should be returned to Kimball, Whittemore, & Co., if they requested it. Greehey did give the paper to Kimball, Whittemore, & Co., and stated all the facts to them above set forth. Kimball, Whittemore, & Co. did not before the next day request the return of said box, or communicate to the defendant any dissent from the arrangement.

The defendant, the next day, with ordinary care and diligence, transported the said goods to Troy, and,

Nelson v. Hudson River R. R. Co.

On the arrival at Troy, the mirror was found to be broken.

EXHIBIT "A."

(COPY.)

HUDSON RIVER RAILROAD COMPANY,
TWELFTH ST. STATION, NEW YORK, Feb. 14, 1863.

In consideration of the Hudson River Railroad Company, and also in consideration of any roads therewith connecting, receiving and carrying at tariff rates, the following property as now packed, viz. :

W. S. NELSON,
FULTON, N. Y. } One box, gilt mirror.

The same being admitted to be articles too bulky to be carried in covered cars, and by reason thereof liable to extra hazards, the owner and shipper hereby release each and all said companies from any liabilities for damage, or loss of or to said articles by reason of breaking, chafing, fire, or water, except such as may be caused by collision or running from the track, resulting from negligence of the company's agents. And the shipper and owner hereby promise to pay freight at such rate, and to claim no deduction therefrom by reason of such damage. Any objection to this contract is to be immediately notified to the proper freight agent of the station at which the property has been delivered, and before said property is shipped therefrom, that a new contract may be made if this contract is not satisfactory.

W. AFFLECK,

Station Agent, per BUEL.

LUKE GREEHEY,

Agent for Shipper and Owner.

[Signed in duplicate.]

The court directed judgment for plaintiff for the full value of the mirror, with costs, and judgment was entered accordingly. Upon appeal by the defendant from this decision to the general term, the judgment

Nelson v. Hudson River R. R. Co.

was affirmed; and from the latter judgment defendant appealed to the court of appeals.

Frank Loomis, for the appellant.

The contract of Greehey bound K., W. & Co. *Anderson v. Coonley*, 21 *Wend.* 273. It was fully ratified by them. *Gage v. Sherman*, 2 *N. Y.* 417; *Seymour v. Wyckoff*, 10 *Id.* 213; *Nixon v. Palmer*, 8 *Id.* 398.

A railroad company is not liable for goods until there has been a delivery to and acceptance by it. *Grosvenor v. New York Central R. R. Co.*, 39 *N. Y.* 34.

K., W. & Co. were authorized to contract for plaintiff; their contract binds him. *St. John v. Van Santvoord*, 6 *Hill*, 157; *Dunlap's Paley's Agency*, 3rd Am. ed., ch. 3, part 1, § 5; *Jeffrey v. Bigelow*, 13 *Wend.* 518; *Anderson v. Coonley*, 21 *Id.* 279; *Smith v. Empire Ins. Co.*, 25 *Barb.* 497; *Medbury v. New York, & Co. R. R. Co.*, 26 *Id.* 564; *New York Life Ins., & Co. v. Beebe*, 7 *N. Y.* 364; *Story on Agency*, § 160; *Sims v. Bond*, 5 *Barn. & Ad.* 393; *Higgins v. Senior*, 8 *Mees. & W.* 834, 844; *Beebe v. Robert*, 12 *Wend.* 419; *Taintor v. Prendergast*, 3 *Hill*, 72; *Van Lien v. Byrnes*, 1 *Hill*, 133; *Meyer v. Harnden's Ex. Co.*, 24 *How. Pr.* 290; *New Jersey Steam Nav. Co. v. Merchants' Bank of Boston*, 6 *How. U. S.* 344, per NELSON, J.; *York Co. v. Central Railroad*, 3 *Wall.* 107.

The contract limiting defendant's liability is valid. *Pierce Am. R. R. Law*, 419, 420; *Story on Bailm.* § 549; *Ang. on Carr.* § 127; *Redf. on Railw.* 266, 273; *Parsons v. Monteath*, 13 *Barb.* 353; *Moore v. Evans*, 14 *Id.* 524; *Wells v. New York Central R. R. Co.*, 26 *Id.* 641; *Dorr v. New Jersey Steam Nav. Co.*, 11 *N. Y.* 485; *Mercantile Mut. Ins. Co. v. Calebs*, 20 *Id.* 173; *Same v. Chase*, 1 *E. D. Smith*, 115; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 *How. U. S.* 344.

Nelson v. Hudson River R. R. Co.

J. H. Townsend, for the respondent.

Plaintiff, as consignee, was presumed to be owner. *Sweet v. Barney*, 23 *N. Y.* 335.

Defendant's liability does not rest upon contract, but upon its duty as carrier. *Merritt v. Earle*, 29 *N. Y.* 115, 122.

The person who delivers goods has not, necessarily, power to contract for transportation. *Robinson v. Baker*, 5 *Cush.* 137; *Stevens v. Boston, &c. R. R. Co.*, 8 *Gray*, 262; *Fitch v. Newbury*, 1 *Dougl.* 1; Redfield's note to *Schneider v. Evans*, 9 *Am. Law Reg. N. S.* 540.

The alleged release was without consideration, and therefore void. *Nevins v. Bay State Steamboat Co.*, 4 *Bosw.* 225; *Dorr v. New Jersey Steam Nav. Co.*, 11 *N. Y.* 485; *Squire v. New York Central R. R. Co.*, 98 *Mass.* 239; *Bissell v. New York Central R. R. Co.*, 25 *N. Y.* 442.

Defendant failed to deliver, and cannot avail himself of the release. 2 *Rev. Stat.* 5 ed. 693, § 97; *Ang. on Carr.* §§ 95-98, 287; *Foy v. Troy, &c. R. R. Co.*, 24 *Barb.* 382; *Smith v. New York Central R. R. Co.*, 43 *Id.* 225; *Grant v. Johnson*, 5 *N. Y.* 247; *Williams v. Holland*, 22 *How. Pr.* 137; *Goold v. Chapin*, 20 *N. Y.* 259; *Pepper v. Haight*, 20 *Barb.* 429.

The alleged usage was invalid because personal and local, not general. *Macy v. Whaling Ins. Co.*, 9 *Metc.* 354; *Wood v. Wood*, 1 *Carr. & P.* 59; *Stevens v. Railway*, 9 *Pick.* 198.

HUNT, C.—It is admitted that the defendant was a common carrier at the time of receiving the looking-glass for transportation. It is conceded also, as a matter of law, that a common carrier may limit his liability by express contract. This has been held many times within a few years past. *Redf. on Carr.* § 11, *et seq.*

Nelson v. Hudson River R. R. Co.

Dorr v. New Jersey Steamboat Nav. Co., 11 N. Y. 486;
Bissell v. New York Central R. R. Co., 25 Id. 442.

An agreement, special and limited in its character, was actually made in this instance, and under which the defendant claims exemption from liability. The plaintiff insists that he gave no authority for the making of that contract, and that he is not bound by it. This presents the first question in the case. The facts lie in a nutshell. Having purchased of Kimball & Whittemore, a gilt mirror and frame, for the sum of one hundred and ninety-five dollars, the plaintiff "directed that the same be well packed in a box by the said Kimball & Whittemore, and *delivered in good order* to the Hudson River Railroad Company, for transportation by them by railroad to Fulton, N. Y., but gave the said Kimball & Whittemore no other authority to contract with the carrier, or to execute the release, of which Schedule A is a copy." The railroad company refused to receive or transport the mirror except upon the terms of the special contract. Had Kimball & Whittemore authority as the agent of the plaintiff to enter into the same?

The authority to the agent was verbal, and therefore entitled to a more liberal construction than would be given to a formal, written instrument. *Story on Agency*, §§ 82-87, 100-103.

The object to be attained was the transportation of the property to Fulton, and no restrictions or limitations were placed upon the means of doing it, except that it should be by the railroad of the Hudson River Company.

The authority thus to be construed, was to deliver the mirror to the railroad company for transportation. A delivery to a carrier for transportation imports an acceptance by the carrier for that purpose. *Redf. on Carr.* § 95 and following. The consent of the carrier to receive is as necessary to the completion of a delivery, as is the consent of a grantee in a deed to the delivery

Nelson v. Hudson River R. R. Co.

of the deed. In neither case can the obligation or the advantage be thrust upon a person without his assent. An authority to deliver for transportation could only be executed by obtaining the consent of the carrier to receive the same. A carrier is not liable for the value of property until he has received the same for transportation, either in fact or in construction of law. If he arbitrarily and illegally refuses to accept the property he may be liable in damages for a breach of his duty, but not as a carrier for the value. 39 *N. Y.* 34.

Kimball & Co. were authorized, then, to carry this mirror to the starting point of the Hudson River Railroad, and to procure its acceptance by that road for the purpose of being transported to Fulton. This authority must be construed to include all the necessary and usual means of carrying it into effect. In *Redfield on Railways* it is said: "As a general rule, the agent to whom the owner intrusts the goods for delivery must be regarded as having authority to stipulate for the terms of transportation." 1 *Redf. on Railw.* 22, citing *London v. N. W. R. W. Co.*, 7 *H & N.* 600; *Lewis v. G. W. R. W.*, 5 *Id.* 867. This is in accordance with the general principle. Numerous instances of this character are collected in *Story on Agency*. Thus, a general authority to collect, receive, and pay debts, will authorize settling accounts, adjusting disputed claims, resisting unjust claims, answering or defending suits, as incident to and included in the primary power. § 58. An authority to collect a debt will authorize an arrest of the debtor. An authority to a broker to effect a policy will authorize him to adjust a loss, and to adopt all necessary means to procure an adjustment. An authority to settle losses on a policy will include a power to refer the matter to arbitration. An authority to sell and convey lands for cash includes an authority to receive the purchase money. *Id.* An agent who is employed to procure a note to be discounted may, unless

Nelson v. Hudson River R. R. Co.

expressly restricted, indorse it in the name of his employer, or he may indorse it in his own name, and claim indemnity of his principal. A servant or agent employed to sell, without express restriction as to mode, may sell by sample or with warranty. § 59. Such an authority also includes not only the means necessary and proper, but all the various means which are justified by the usage of trade, thus authorizing a sale upon credit when that mode of sale is justified by the usage of trade. § 60. In other words, the agent is clothed with full authority to use all the usual and appropriate means to accomplish the end, unless a more restricted authority is established. §§ 73, 102, 103.

These principles amply justify the authority to make the contract in question by Kimball & Whittemore on behalf of plaintiff. They were directed to deliver the mirror to the carrier. This required them to procure an acceptance of the article by the company. They were directed in effect to procure "its transportation to Fulton by the railroad company." This could only be accomplished by entering into a contract that it should be transported upon an open carriage, where it was exposed to unusual hazard of injury, and upon specified terms of liability. The mirror must remain uncarried by the Hudson River Company, or this arrangement must be made. The plaintiff's authority was general, and was unrestricted. In my judgment, the contract made, to wit, that it might be shipped upon an open carriage, and that the carrier should not be responsible for any breakage thereof, was within the agent's authority, and is obligatory upon the plaintiff.

It is said in further objection to the right of recovery, that the agreement was without consideration, and for that reason is void. This argument is based upon that section of the statute (*Laws of 1850*, ch. 140, § 36), which makes it the duty of a railroad company to receive and transport property "on the due payment of the freight

Nelson v. Hudson River R. R. Co.

or fare legally authorized therefor." They were bound, it is said, to carry it, and there is nothing to show that the defendant could or would have charged a higher price if the property had been transported in a covered carriage. This argument is based upon the assumption that the defendant was bound to carry this mirror at a rate or price fixed by law, and that the law fixed their liability, founded upon that rate or price. I do not understand that either of these assumptions is well founded. The statute fixes no rate of fare, either for mirrors or non-perishable property; for goods carried in covered cars or in open cars. The whole thing is a matter of contract. The company can fix any reasonable rates they think proper, and vary them at pleasure. They received the mirror in question for transportation over their road; they were bound so to transport it; if they failed to deliver it uninjured, they were liable, or not, according as the injury was or was not the result of causes for which they agreed to be liable. The undertaking to carry was the consideration for the agreement of the shipper, as the liability of the shipper to pay the freight was the consideration for the agreement of the carrier to transport. There was a mutual and sufficient consideration; the same that exists in the ordinary case of shipment of goods with or without a special contract.

Without intending to weaken any other ground of defense, by not alluding to it, I am content to place my judgment upon the grounds stated. The plaintiff recovered the full value of his mirror, notwithstanding the injury to it accrued from a cause for which it was expressly stipulated that the defendant should not be liable. This was error.

There should be a new trial, with costs to abide the event.

EARL, C.—It is not very important, as I view this

Nelson v. Hudson River R. R. Co.

case, to determine whether the consignee of goods is, in the absence of any other indication of ownership, to be presumed the owner of the goods shipped. It was held that he was, by one of the learned judges who wrote the opinion at the general term, in this case. And such was the dictum of Judge JAMES, in *Sweet v. Barney*, 23 *N. Y.* 335, and of BRONSON, Ch. J., in *Price v. Powell*, 3 *Cow.* 322; and by the same learned judge, in *Everett v. Saltus*, 15 *Wend.* 474. But in *York Company v. Central Railroad*, 3 *Wall.* 107, Mr. Justice FIELD held that the consignors, who were in that case not the owners of the property shipped, but the mere agents of the consignees, were to be treated as the owners.

Whether the consignor or the consignee is to be presumed, in the absence of proof, to be the owner of the goods shipped, for the purpose of determining the rights and liabilities of the carrier to the real owner, it cannot well be disputed that the consignor of goods to a distant owner as consignee, must be treated as the agent of the consignee, for the purpose of shipping and consigning the goods, as the consignee of a distant owner who is the consignor is the agent of the latter to receive the goods consigned to him. No other rule would be found practicable or convenient in the extensive commerce of our country, carried on through the agency of common carriers. It was so held in *London and North Western Railway v. Bartlett*, 7 *H. & N.* 400. In *Redfield on Carriers*, section 52, the learned author says: "As a general rule, the agent to whom the owner entrusts the goods for delivery must be regarded as having authority to stipulate for the terms of transportation. By this we do not mean the porter or cabman, or mere servant, but the consignor of the goods, or any other agent of the owner, who purchases or procures them for him." In *York Company v. Central Railroad*, *supra*, Trout & Son shipped at Memphis,

Nelson v. Hudson River R. R. Co.

on the Mississippi, a large quantity of cotton on board a steamer belonging to the Illinois Central Railroad Company, which, by the terms of the bill of lading, was to be delivered at Boston, Massachusetts, the consignees, the York Company, paying freight, "fire and the unavoidable dangers of the river only excepted." In the course of the transit, the cotton was destroyed by fire, and the York Company sued the carriers in the United States circuit court for damages. It appeared that Trout & Son were the agents of the company, and that the latter owned the cotton. The defendant had judgment. On error in the supreme court, it was objected that the exemption from liability specified in the bill of lading did not bind the plaintiff, because Trout & Son, who were merely agents of the York Company, could not give their assent to such exemption, so as to bind the company; and because, further, there was no consideration for such exemption. Both grounds of objection were considered by the court, and held not to be available. It was held that the consignees were bound by the contract made by the consignors as their agents. The objection of a want of consideration was answered by Mr. Justice FIELD as follows: "There is no evidence that a consideration was not given for the stipulation. The company probably had rates of charges in proportion to the risks they assumed from the nature of the goods carried, and the exception of losses by fire must necessarily have affected the compensation demanded." There was in the case no proof of a reduced compensation for the carriage on account of the exemption from the risks specified; but the court, in the absence of any proof to the contrary, presumed that there was such a reduction. In the case of *Squire v. New York Central Railroad Company*, 98 *Mass.* 239, the plaintiffs bought hogs in Chicago, and sent a drover to attend and take care of them to Boston. At Suspension Bridge, on the route, they were dis-

Nelson v. Hudson River R. R. Co.

charged into the stock-yard of the railroad company ; cars were brought to the yard and the hogs loaded into them. The ticket master gave the drover a pass and handed to him at the same time a written contract, saying that he must sign it, and asked him to sign it with the name of the plaintiffs, which he did, without express authority from them. The contract was also signed by the station agent, and limited the liability of the railroad company in several important particulars, and, among other things, exempted the company from injury to the hogs from suffocation. Some of the hogs were suffocated before reaching Albany, and, in an action by the owners to recover their value, it was held that the contract was binding upon them, and that the company was not liable. GRAY, J., says : " That even if the drover had no express authority from the plaintiffs to sign any contract relating to their transportation, he was the person in charge of the property, and the only one with whom the defendants could make the necessary arrangements, and stood toward them for this purpose in the position of an owner. See also *Christensen v. American Express Co.*, 15 *Minn.* 270.

In the case under consideration the plaintiff bought the mirror of Kimball, Whittemore, & Co., and paid them therefor one hundred and ninety-five dollars, and also paid them five dollars for boxing and shipping it, and directed them to deliver it to the railroad company for transportation to him, and gave them no other authority. They thus became the consignors of the mirror, and the agents of the plaintiff for shipping and consigning the same, with all the powers and authority incident to such an agency. The agency was not limited by any instructions of the principal, and hence the agents were general agents in the particular business, possessing all the implied power requisite to do the business in any of the ordinary and customary modes. *Anderson v. Coonley*, 21 *Wend.* 279 ; *Jeffrey*

Nelson v. Hudson River R. R. Co.

v. Bigelow, 13 *Id.* 518. Within such limits they stood in the place of the principal, and according to the cases above cited from 3 *Wall.* and 98 *Mass.* could be treated with by the carrier as owners.

It appeared that the defendant had for a long time been accustomed to refuse to receive or carry, at its ordinary tariff, large mirrors too bulky to be carried in covered cars, and for that reason liable to extra hazards, unless and until the shippers thereof would execute and deliver a release of liability similar to the release which was executed in this case, and that this custom was well known to the consignors. It matters not that this custom was not known to the plaintiff. It was proper that it should appear, and is important only to show that the alleged contract of shipment was an ordinary and usual one to be made upon the shipment of such property, and hence that it was within the implied authority confided to the consignors by the plaintiff. Hence, I reach the conclusion that the consignors had an implied authority to make the alleged contract; and the next question to be considered is, whether they did in fact make it on behalf of the plaintiff.

The consignors, as above stated, knew that it was usual for the railroad company to exact such a contract and to charge special rates if it was not made. When their cartman delivered the mirror to the company for transportation, it was found to be too bulky to be carried in a covered car, and the railroad agent refused to receive it unless the cartman would first sign the contract. Thereupon he, knowing the custom in such cases, signed the contract as "agent for shipper and owner." The railroad agent also signed the same and delivered a copy thereof to the cartman, and it was agreed that the box containing the mirror should be retained in the railroad depot till the next day, and should be returned to the consignors if they requested it. The cartman gave the copy of the contract to the

Nelson v. Hudson River R. R. Co.

consignors and stated to them all the above facts. The contract itself specified that if any objection was made to it, notice was to be given to the freight agent, that a new contract might be made. The consignors did not before the next day request the return of the box or communicate to the defendant's agent any dissent from the arrangement, and the defendant therefore forwarded the box. The cartman was not authorized to make this contract. He was merely the servant of the consignors to deliver this box to the railroad, and was clothed with no discretion to act for them. No authority could be implied from his character and business, and his principals were near at hand, where they could be consulted, and they could act for themselves. But he assumed to act for them and to do what they were authorized to do. They were notified of all the facts, and the contract made by him for them was delivered to them. They were informed that if they had any objection to the contract made by their assumed agent, they should notify the defendant the next day. They made no objection, and expressed no dissatisfaction with the contract, leaving the defendant's agent to suppose that it was satisfactory to them. It seems to me that these facts constitute a most emphatic and unequivocal ratification of the contract. A subsequent ratification, with knowledge of the facts, of the acts of an assumed agent, is equivalent to an original authority; and as this was a contract which the consignors could have deputed the cartman to make for them, it must be treated as if made by them in person and binding upon the plaintiff. We have, then, this contract exempting the defendant from the very risk (breaking) which caused the damage complained of. It cannot be claimed that the contract was illegal because it limited the liability of the defendant as a common carrier, for such contracts are tolerated by the law. It cannot be condemned as extorted from the consignors by the

Nelson v. Hudson River R. R. Co.

defendant in violation of its duty as a common carrier, because the contract was voluntarily made by them. They had the option either to insist that the defendant should transport the box, without any special contract, subject to the duty and responsibility imposed by law, or to make a special contract for the carriage. They voluntarily chose the latter, and the contract is binding if founded upon a sufficient consideration, and whether it was or not will now be considered.

There is no law regulating the amount of freight which railroad companies may properly charge. They are bound to carry such property as may be offered to them for transportation, upon due payment of freight. They must carry for all upon equal terms, charging one no more than another for freight or property delivered under like circumstances. But they are not bound to carry all kinds of property for the same freight. They may charge ordinary rates for some kinds of property exposed in the carriage to ordinary hazards, and extra rates for property exposed to extra hazards. As railroad companies are *bound* to carry without any contract limiting their liability, their mere agreement to carry does not furnish a consideration for the agreement to limit their liability; nor does their agreement to carry for the price which they would be authorized to charge in case their liability was not limited. *Bissell v. New York Central R. R. Co.*, 25 *N. Y.* 442. But it is a sufficient consideration if they agree to carry for a reduced compensation because their liability is limited. In *York Company v. Central Railroad*, *supra*, it was held that where there was an agreement limiting the liability of the carrier, it would be presumed, in the absence of proof to the contrary, that it was upon the consideration of a reduced compensation for the carriage. Such a presumption is not unreasonable, but it is not necessary to indulge in it in this case. Here the consideration of the restricted liability was not simply

Nelson v. Hudson River R. R. Co.

the agreement of the defendant to *carry*, but to carry at "tariff rates." This was a consideration satisfactory to the parties. How can we say, in the absence of proof, that "tariff rates" meant the full rate which could be charged for freight upon the mirror? In view of all the facts and circumstances disclosed, it is clear that "tariff rates" meant a less rate than the defendant was authorized to charge for the carriage of mirrors and other articles exposed to extra hazard. Here, then, the consideration for the agreement to limit the defendant's liability was the agreement to carry for a reduced compensation, and we reach the conclusion that the contract was a valid, binding contract between the plaintiff and the defendant.

The only further question to be considered is whether the defendant discharged its duty under the contract. The receipt given by defendant's freight agent, at the time of the execution of the above-mentioned contract and the delivery of the box, is as follows: "Received from Kimball, Whittemore, & Co., in good order, on board the N. Y. C. R. R., for Fulton, N. Y., the following package: One box, mirror, marked W. S. Nelson, Fulton, N. Y." There is an evident mistake in this receipt. The box was not received on board the New York Central Railroad, or on board of any other road. It was received at the depot of the defendant in New York, to be carried over its road, connecting with the New York Central Railroad at Troy. Some words are manifestly omitted, and the receipt should probably have stated that the box was received to be delivered on board the New York Central Railroad. It must be read as if some such words were contained in it, and it must be construed in connection with the contract executed at the same time. The two instruments together show clearly that the defendant undertook the duty of an intermediate carrier, to take the box and carry it to Troy, the terminus of its route, and there

Mulligan v. Illinois Central R. R. Co.

to deliver it on board of the New York Central Railroad. There is nothing, either in the two instruments or in the circumstances surrounding the transaction, from which we can infer that the defendant undertook to carry the box to Fulton, far beyond the terminus of its road. Hence, the defendant discharged its duty when it carried this box to Troy and tendered it for carriage to the New York Central Railroad Company. Upon the refusal of the latter company to receive and carry it, it should have notified the plaintiff of such refusal. But as the neglect to notify the plaintiff caused him no damage, it is of no consequence in this action.

Having thus carefully examined the important questions raised and discussed in this case, I have reached the conclusion that the plaintiff was not entitled to recover, and the judgment must be reversed and new trial granted; costs to abide event.

All concur.

BY THE COURT.—Judgment reversed.

MULLIGAN v. THE ILLINOIS CENTRAL RAILROAD COMPANY.

Supreme Court of Iowa; April Term, 1873.

Liability of railroad receiving goods for transportation beyond its terminus. The acceptance by a railway company, as a common carrier, of goods marked to a destination beyond the terminus of its road, creates a *prima facie* liability to transport to and deliver at that point. But the effect of such acceptance may be modified by a special contract, or by proof of a usage known to the shipper.

Bill of lading. A bill of lading, stipulating that a railroad assumes

Mulligan v. Illinois Central R. R. Co.

no other responsibility as to the property shipped, than such as may be incurred upon its own road, if accepted by the shipper, in the absence of fraud or mistake, discharges the railroad from liability for a loss sustained beyond its terminus.

As a bill of lading is signed by one party only, the evidence of assent to its terms by the other party is usually his accepting and acting upon it. And his acceptance without objection is conclusive of his assent, where it does not appear that any fraud or imposition, was practiced, or that any mistake intervened.

This was an action to recover the value of a quantity of bacon and butter, shipped by the plaintiff upon the defendant's railway, consigned to New Orleans, but which never reached the consignee.

The bills of lading given for the goods in question contained a line in italic, as follows: *Read this contract*; under which the conditions of the agreement for transportation were printed. One of these was that "for all loss and damage occurring in the transit of said property, the legal remedy shall be against the particular carrier or forwarder only, in whose custody the said property, whether by delay or otherwise, may actually be at the time of the happening thereof, it being understood that the said Illinois Central Railroad Company assumes no other responsibility as to said property, than such as may be incurred on its own road."

Upon the trial there was no proof of any contract on the part of the defendant further than as implied from the receipt of the goods and the execution of the bills of lading. The evidence showed that the defendant was incorporated under special statute of the state of Illinois, and authorized to construct, maintain, and operate a railroad from the southern terminus of the Illinois and Michigan Canal to the city of Cairo, with certain lateral branches, and that Cairo was the southern terminus of defendant's line of road. Evidence was also introduced tending to show that at the time of this

Mulligan v. Illinois Central R. R. Co.

shipment, the defendant held itself out as a carrier of freight south of Cairo, only so far as to deliver it to connecting lines, and that in due time, and in the regular course of business according to its usual custom, it shipped the goods on steamboats running between Cairo and New Orleans, and took the proper receipts of the respective clerks therefor.

Against the objection of defendant, the plaintiff was permitted to testify that he did not know when he shipped the goods that defendant undertook to limit its liability to Cairo, and that he did not accept the receipt with a knowledge of the condition contained therein, nor with the intention of assenting that the defendant should not be bound beyond its own line of road.

The jury rendered a verdict for the plaintiff. The defendant appealed from the judgment entered on the verdict.

Crane & Rood, for appellant.

Smith, Fouke, & Chapin, for appellee.

DAY, J.—The court instructed the jury as follows: "If you find that defendant received the goods in controversy, consigned and marked for New Orleans, then, in the absence of any agreement limiting its liability, it was bound to deliver the same at New Orleans, and if it failed so to do it would be liable in this action. But such liability may be changed by a special contract, and if defendant, at the time of receiving the goods, executed to plaintiff the receipt admitted in evidence, and the plaintiff received the same knowing the contents, then defendant is not liable in this action."

The defendant excepted to this instruction, and now assigns the giving of the same as error.

This instruction embraces three propositions:

Mulligan v. Illinois Central R. R. Co.

First. The liability incurred by a railroad company by the simple acceptance of goods consigned to a point beyond the terminus of its road.

Second. How this liability is affected by the delivery to and acceptance by the shipper, of a bill of lading, limiting its liability to its own line of road.

Third. The effect of ignorance, on the part of the shipper, of the conditions contained in the bill of lading accepted by him.

A discussion of these propositions will embrace the leading questions presented by this appeal.

I. As to the liability which a railroad company incurs by the mere acceptance of goods consigned to a point beyond the terminus of its road.

Upon this question there is a striking lack of uniformity in the decisions. There are three views which have been maintained by their respective advocates with perhaps equal cogency of reasoning.

First. That where carriers receive and receipt for goods consigned to a point beyond the terminus of their road, without any special contract respecting the same, the agreement is one for transportation the whole distance, upon which the first carrier may be sued for a loss occurring after the goods have passed beyond the terminus of its road.

The first case which has generally been cited as announcing this doctrine is *Muschamp v. Lancaster R. R. Co.*, 8 *Mess. & W.* 421, decided in the Court of Exchequer in 1841, followed and re-enforced in *Collins v. Bristol and Exeter R. R.*, 11 *Elch.* 790, and extended even to goods booked beyond the limits of England. See also *Illinois Central R. R. Co. v. Copeland*, 24 *Ill.* 332; *Angle v. Mississippi, &c. R. R. Co.*, 9 *Iowa*, 487.

Second. That where a carrier receives goods marked for a particular destination beyond the terminus of its line, and does not expressly undertake to deliver them at the point designated, the implied contract is only to

Mulligan v. Illinois Central R. R. Co.

transport over its own line, and forward, according to the usual course of business, from its terminus. See *McMillan v. Michigan Southern, &c. R. R. Co.*, 16 *Mich.* 120; *Van Santvoor v. St. John*, 6 *Hill (N. Y.)* 3, 157; *Farmers' &c. Bank v. Champlain Transp. Co.*, 21 *Vt.* 186; *Brintwall v. Saratoga, &c. R. R. Co.*, 32 *Vt.* 665; *Hood v. New York, &c. R. R. Co.*, 22 *Conn.* 1, 502; *Elmore v. Naugatuck R. R. Co.*, 23 *Conn.* 457; *Naugatuck R. R. Co. v. Waterbury Button Co.*, 24 *Conn.* 468; *Nutting v. Connecticut River R. R. Co.*, 1 *Gray*, 502; *Burroughs v. Norwich, &c. R. R. Co.*, 100 *Mass.* 26; *Darling v. Railroad Co.*, 11 *Allen*, 295; *Root v. Great Western R. R. Co.*, 45 *N. Y.* 524; *Jemison v. Camden, &c. R. R. Co.*, 4 *Am. Law Reg.* 234; *United States Ex. Co. v. Rush*, 24 *Ind.* 403; *Pennsylvania Central R. R. v. Schwarzenberger*, 45 *Pa. St.* 208; *Rome R. R. Co. v. Sullivan*, 25 *Ga.* 228.

Third. That the mere acceptance of goods by a common carrier marked to a destination beyond the terminus of its line, as a matter of *law* imports no absolute undertaking upon the part of the carrier beyond the end of its road, but is a matter of evidence to be submitted to the jury, from which, in connection with other evidence produced, they are to determine, as a question of *fact*, the real agreement entered into.

This position was very ably maintained in a recent and elaborate opinion of the supreme court of New Hampshire, reviewing almost the whole current of decisions from *Muschamp v. Lancaster Railway Co.*, 8 *Mees. & W.* 421, down to the present period. See *Gray v. Jackson*, 51 *N. H.*

The question is not an open one in this state. In *Angle v. Mississippi, &c. R. Co.* 9 *Iowa*, 487, the rule was settled as it is understood to exist in England, and it was held that the acceptance by a carrier of goods marked to a destination beyond the terminus of its road creates a *prima facie* liability to transport to and

Mulligan v. Illinois Central R. R. Co.

deliver at that point, which may be modified by proof of a different usage known to the shipper at the time of making the consignment.

The court did not err, therefore, in the first branch of the foregoing instructions, as applied to the evidence introduced, there being no proof that plaintiff knew of a usage of the defendant not to transport freight beyond Cairo.

II. As to the effect of the bill of lading. The law imposes upon common carriers the duty of carrying all goods offered to them in the usual course of business when they have the means of transportation and the proper compensation is tendered.

But the law does not impose upon such carriers the duty of undertaking to transport goods beyond the termini of their respective routes.

Whenever liability for such transportation exists it arises either from express contract or from an implied agreement arising from the acceptance of goods consigned to points beyond the termini of their routes. As they are originally under no obligation to undertake to transport beyond the end of their lines, it is clear that they may by special agreement stipulate that they shall not be liable beyond such point. *Fowler v. Great Western R. R. Co.*, 16 *Eng. L. & Eq.* 531; *Pierce on Railroad Law*, 458; *Detroit, &c. R. R. Co. v. Farmers', &c. Bank*, 20 *Wis.* 122.

A bill of lading possesses the dual character of a receipt evidencing the delivery of the goods to the carrier's possession, and a contract containing the stipulation under which the transportation is to be undertaken. The only reasonable construction which can be placed upon the bill of lading in this case is that it contains a positive stipulation that the defendant does not agree to carry beyond the termini of its road. It is not an agreement to carry beyond such termini, with a stipulation that it shall not be liable for injuries

Mulligan v. Illinois Central R. R. Co.

happening beyond that point. It concludes as follows: "It being understood that the said Illinois Central Railroad Company assumes no other responsibility as to said property than such as may be incurred on its own road."

What are the duties of a common carrier respecting goods placed in its possession for transportation? To convey them safely and with reasonable dispatch as far as its agreement extends and to forward thence according to the usual course of business. Does then this company undertake to carry to New Orleans, and at the same time stipulate that for a refusal to perform this agreement it shall not be responsible? This construction involves an inconsistency.

The provisions of this bill of lading are not in conflict with *Laws of 1866*, ch. 113, which simply provides that, when the duties of a common carrier are undertaken, the company shall not by receipt, rule, or regulation exempt itself from the full liabilities of a common carrier, which in the absence of such contract, &c., would exist. The effect of the agreement in this case is that the defendant did not assume the duties of a common carrier, beyond Cairo, the southern terminus of its road. It is clear to us that this contract was so accepted or acted upon by the plaintiff as to be binding upon him; that the defendant is not liable for a loss occurring beyond the limits of its line of road.

III. As to the effect of the shipper's ignorance of the terms of the bill of lading by him accepted.

From the abstract it appears that the conditions in this bill of lading were printed upon its face, and the attention of the shipper was called thereto by the direction, "*Read this Contract*," printed in italics. There is no evidence of any fraud, imposition, or mistake. A bill of lading, like a deed poll and many other classes of contracts, is signed by one party only, and in such case the evidence of assent upon the part of the other

Mulligan v. Illinois Central R. R. Co.

party usually consists in his accepting and acting upon it. And the evidence of assent derived from his acceptance of the contract without objection, is usually conclusive. In this case the defendant tendered to the plaintiff a contract containing the stipulations and conditions under which defendant was willing to undertake the transportation of the goods offered, and challenged an examination of its contents by the first sentence which would have met the plaintiff's eye, if he had taken the trouble to look at it. From an acceptance of this paper without protest or objection, the defendant had a right to presume that plaintiff assented to its terms. It would therefore operate as a fraud to permit plaintiff now to say, "I did not read the bill of lading, and was not aware of its contents, did not know that you undertook to limit your liability to Cairo, and did not assent that you should do so."

It not appearing that any fraud or imposition was practiced, nor that any mistake intervened, the plaintiff must be conclusively presumed to have become acquainted with its contents, and if he did not do so, the consequences of his folly and negligence must rest upon himself. Courts cannot undertake to relieve parties from the effects of such inattention and want of care. If once they should enter this doubtful domain, it is impossible to foresee to what length their interference might be pressed, or of what limits it would finally admit.

These views are abundantly sustained by authority. For a full and masterly discussion of the question, see opinion of COOLEY, J., in *McMillan v. Michigan Southern, &c. R. R. Co.*, 16 *Mich.* 80 (89, 114), and cases there cited. Also *Kallman v. United States Exp. Co.*, 8 *Kans.* 205; *How v. New Jersey Steam Nav. Co.*, 11 *N. Y.* 491; *Hopkins v. Westcott*, 7 *Am. Law Reg. N. S.* 633. In Illinois it is held, but contrary, as we believe, to the weight of authority, that it is a question

Mulligan v. Illinois Central R. R. Co.

of fact whether a party accepting a bill of lading knew of its condition, and assented thereto. Merchants' Union Exp. Co. v. Schier, 55 Ill. 140. In making the defendant's discharge from liability, under the bill of lading, to depend upon the plaintiff's knowledge of the contents thereof, and in submitting to the jury, under the circumstances of this case, the question of such knowledge, the court in our opinion erred.

IV. For the reasons above stated there was also error in allowing the plaintiff to testify that he did not accept the receipt with a knowledge of the condition contained therein, nor with the intention of assenting that the defendant should not be bound beyond its own line of road.

V. But one further question demands our consideration. In his original petition plaintiff alleges that at the time he shipped the bacon and butter he received therefor receipts, and he attaches them as exhibits to his petition. The receipts are the same as the bills of lading set forth in the preceding statement of facts.

Afterwards the plaintiff filed a substituted petition, in which he states that he withdraws all pleadings before filed. In this he makes no mention of having received any receipts or bills of lading at the time of shipment. The defendant asks the court to instruct the jury that "the plaintiff in his pleadings admits that at the time the goods mentioned in his petition were delivered to defendant, he received from said defendant bills of lading or receipts therefor."

The court refused to give this instruction, and such refusal is assigned as error. In our opinion the instruction should have been given. Although the plaintiff stated in his substituted petition that he withdrew all pleadings before filed, yet this did not operate to withdraw from the files the original petition. Rev. § 2983. It ceased to tender any issue to which defendant was

Michigan Central R. R. Co. v. Mineral Springs Manufacturing Co.

called upon to respond, or which plaintiff might make the foundation of his claim. Yet it remained a part of the record in the case, containing a distinct and solemn admission of a fact. And in the absence of any showing that this admission was made improvidently or through mistake, it must be taken as conclusive. 1 *Greenl. on Ev.* §§ 205, 206.

By the COURT.—Judgment reversed.

THE MICHIGAN CENTRAL RAILROAD COMPANY v. THE MINERAL SPRINGS MANUFACTURING COMPANY.

Supreme Court of the United States; December Term, 1872.

Carriers. Connecting lines. A railroad company receiving for transportation, as a common carrier, property, the place of destination of which is beyond the terminus of the road, is bound, in the absence of any special contract, to carry safely to the end of its line and to deliver to the next carrier in the route beyond.

A railroad company cannot, under such circumstances, escape responsibility by storing the goods at the end of its route, without delivery or an attempt to deliver to the connecting carrier. If there be a necessity for storage, it will be considered a mere accessory to the transportation, and not as changing the nature of the bailment. The simple deposit of the goods in the railroad depot, unaccompanied by any act indicating an intention to renounce the obligation of a carrier, will not change or modify the liability of the company. Circumstances may arise after the goods have reached the depot which would justify the carrier in warehousing them, but if he had reasonable grounds to anticipate the occurrence of these adverse circumstances when he received the goods, he cannot by storing them change his relation towards them.

Michigan Central R. R. Co. v. Mineral Springs Manufacturing Co.

A provision in the charter of a railroad company that the company shall be responsible for goods in their depots awaiting delivery as warehousemen, and not as common carriers,—*Held*, not to apply to goods in course of transportation awaiting delivery to a connecting carrier, where the other clauses of the section containing this provision were clearly limited to goods awaiting delivery to consignees.

Limitation of Liability as carrier by notice. An unsigned notice, printed on the back of a receipt for goods delivered to a railway company for transportation, that all goods and merchandise are at the risk of the owners thereof while in the company's warehouses, except for such loss or injury as may arise from the negligence of the agents of the company, cannot operate to restrict the liability of the company as carrier. The law, in conceding to carriers the privilege to obtain any reasonable qualification of their responsibility by express contract, has gone as far in this direction as public policy will allow.

Error from the supreme court of the United States to the circuit court for the district of Connecticut.

This was an action for damages for the destruction by fire of a quantity of wool, owned by the plaintiff, while in the depot of the defendant, in course of transportation.

The circumstances of the case appear in the opinion.

The jury rendered a verdict for the plaintiff; and to the judgment entered thereon the defendant prosecuted this writ of error.

DAVIS, J.—If the plaintiffs in error are to be considered as warehousemen at the time the wool in question was burned, they are not liable in this action, because the fire which caused its destruction was not the result of any negligence on their part. If, on the contrary, their duty as carriers had not ceased at the time of the accident, and there are no circumstances connected with the transaction which lessen the rule applicable to that employment, they are responsible, for carriers are substantially insurers of the property

Michigan Central R. R. Co. v. Mineral Springs Manufacturing Co.

entrusted to their care. The controversy is as to the nature of the bailment when the fire took place.

The jury, under the instructions of the court, found that the railroad company were chargeable as carriers, and this writ of error is prosecuted to reverse that decision. The case, as contained in the bill of exceptions, is, in substance, this :

In October, 1865, at Jackson, a station on the Michigan Central Railroad, about seventy-five miles west of Detroit, one Bostwick delivered to the agent of the company, for transportation, a quantity of wool, consigned to the defendant in error, at Stafford, Connecticut, and took a receipt for its carriage, on the back of which was a notice that all goods and merchandise are at the risk of the owners while in the warehouses of the company, unless the loss or injury to them should happen through the negligence of the agents of the company. Verbal instructions were given by Bostwick that the wool should be sent from Detroit to Buffalo, by lake, in steamboat, which instructions were embodied in a bill of lading sent with the wool. Although there were several lines of transportation from Detroit eastward by which the wool could have been sent, there was only one transportation line propelled by steam on the lakes, and this line was, and had been for some time, unable, in their regular course of business, to receive and transport the freight which had accumulated in large quantities at the railroad depot in Detroit. This accumulation of freight there, and the limited ability of the line of propellers to receive and transport it, were well known to the officers of the road, but neither the consignor, consignee, or the station master at Jackson were informed on this subject. The wool was carried over the road to the depot in Detroit, and remained there for a period of six days, when it was destroyed by an accidental fire. During all the time it was in the

Michigan Central R. R. Co. v. Mineral Springs Manufacturing Co.

depot it was ready to be delivered for further transportation to the carrier upon the route indicated. The charter of the company, which was pleaded and offered in evidence, contains a clause, that in all cases the company shall be responsible for goods on deposit in any of their depots awaiting delivery, as warehousemen, and not as common carriers.

On this state of facts the circuit court refused to charge the jury that the liability of the plaintiffs in error was the limited one of a warehouseman importing only ordinary care, but, on the contrary, charged that they were liable for the wool as common carriers during its transportation from Jackson to Detroit, and after its arrival there, for such reasonable time as, according to their usual course of business, under the actual circumstances in which they held the wool, would enable them to deliver it to the next carrier in the line, but that the defendant in error took the risk of the next carrier line not being ready and willing to take said wool, and submitted to the jury to say whether, under all the circumstances of the case in evidence before them, such reasonable time had elapsed before the occurrence of the fire.

It is not necessary in the state of this record to go into the general subject of the duty of the carriers in respect to goods in their custody which have arrived at their final destination. Different views have been entertained by different jurists of what the carrier is required to do when the transit is ended in order to terminate his liability, but there is not this difference of opinion in relation to the rule which is applicable while the property is in process of transportation from the place of its receipt to the place of its destination.

In such cases it is the duty of the carrier, in the absence of any special contract, to carry safely to the end of his line and to deliver to the next carrier in the route beyond. This rule of liability is adopted gen-

Michigan Central R. R. Co. v. Mineral Springs Manufacturing Co.

erally by the courts in this country, although in England at the present time, and in some of the states of the Union, the disposition is to treat the obligation of the carrier who first receives the goods as continuing throughout the entire route. It is unfortunate for the interests of commerce that there is any diversity of opinion on such a subject, especially in this country, but the rule that holds the carrier only liable to the extent of his own route, and for the safe storage and delivery to the next carrier, is in itself so just and reasonable that we do not hesitate to give it our sanction. Public policy, however, requires that the rule should be enforced, and will not allow the carrier to escape responsibility on storing the goods at the end of his route, without delivery or an attempt to deliver to the connecting carrier. If there be a necessity for storage, it will be considered a mere accessory to the transportation, and not as changing the nature of the bailment. It is very clear that the simple deposit of the goods by the carrier in his depot, unaccompanied by an act indicating an intention to renounce the obligation of a carrier, will not change or modify even his liability. It may be that circumstances may arise after the goods have reached the depot which would justify the carrier in warehousing them, but if he had reasonable grounds to anticipate the occurrence of these adverse circumstances when he received the goods, he cannot by storing them change his relation towards them.

Testing the case in hand by these well-settled principles, it is apparent that the plaintiffs in error are not relieved of their proper responsibility, unless through the provisions of their charter, or by the terms of the receipt which was given when they received the wool. They neither delivered nor offered to deliver the wool to the propeller company. Nor did they do any act

Michigan Central R. R. Co. v. Mineral Springs Manufacturing Co.

manifesting an intention to divest themselves of the character of carrier and assume that of forwarder.

It is insisted that the offer of delivery would have been a useless act, because of the inability of the line of propellers, with their means of transportation, to receive and transport the freight which had already accumulated at the Michigan Central depot for shipment by lake. One answer to this proposition is that the company had no right to assume, in discharge of its obligation to this defendant, that an offer to deliver this particular shipment would have been met by a refusal to receive. Apart from this, how can the company set up, by way of defense, this limited ability of the propeller line, when the officers of the road knew of it at the time the contract of carriage was entered into, and the other party to the contract had no information on the subject?

It is said, in reply to this objection, that the company could not have refused to receive the wool, having ample means of carriage, although it knew the line beyond Detroit, selected by the shipper, was not at the time in a situation to receive and transport it. It is true the company were obliged to carry for all persons, without favor, in the regular course of business, but this obligation did not dispense with a corresponding obligation on its part to inform the shipper of any unavoidable circumstances existing at the termination of its own route in the way of a prompt delivery to the carrier next in line. This is especially so when, as in this case, there were other lines of transportation from Detroit eastward, by which the wool, without delay, could, have been forwarded to its place of destination. Had the shipper at Jackson been informed, at the time, of the serious hindrances at Detroit to the speedy transit of goods by the lake, it is fair to infer, as a reasonable man, he would have given a different direction to his property. Common fairness requires that at

Michigan Central R. R. Co. v. Mineral Springs Manufacturing Co.

least he should have been told of the condition of things there, and thus left free to choose, if he saw fit, another mode of conveyance. If this had been done, there would be some plausibility in the position that six days was an unreasonable time to require the railroad company to hold the wool as a common carrier for delivery. But under the circumstances of this case the company had no right to expect an earlier period for delivery. They cannot, therefore, complain of the response of the jury to the inquiry on this subject submitted to them by the circuit court.

It is earnestly argued that the plaintiff in error is relieved from liability under the provisions of its charter, if not by the rules of the common law. Is this so?

The whole section of the charter under which the exemption from liability is claimed is as follows: "The said company may charge and collect a reasonable sum for storage upon all property which shall have been transported by them upon delivery thereof at any of their depots, and which shall have remained at any of their depots more than four days: *Provided*, That elsewhere than at their Detroit depot, the consignee shall have been notified if known, either personally or by notice left at his place of business or residence or by notice sent by mail, of the receipt of such property at least four days before any storage shall be charged, and at the Detroit depot such notice shall be given twenty-four hours (Sundays excepted) before any storage shall be charged after the expiration of said twenty-four hours upon goods not taken away: *Provided*, That in all cases the said company shall be responsible for goods on deposit in any of their depots awaiting delivery as warehousemen, and not as common carriers."

It is quite clear that this section refers to property which has reached its final destination, and is there awaiting delivery to its owner. If so, how can the

Michigan Central R. R. Co. v. Mineral Springs Manufacturing Co.

proviso in question be made to apply to another and distinct class of property? To perform this office it must act independently of the rest of the section, and enlarge rather than limit the operation of it. This it cannot do, unless words are used which leave no doubt the legislature intended such an effect to be given to it.

It is argued, however, that there is no difference between goods to be delivered to the owner at their final destination and goods deliverable to the owner, or his agent, for further carriage; that in both cases as soon as they are "ready to be delivered" over, they are "awaiting delivery." This position, although plausible, is not sound. There is a clear distinction, in our opinion, between property in a situation to be delivered over to the consignee on demand, and property on its way to a distant point to be taken thence by a connecting carrier. In the former case it may be said to be awaiting delivery; in the latter, to be awaiting transportation. And this distinction is recognized by the supreme court of Michigan in the case of the present plaintiff in error *v. Hale*, 6 *Mich.* 243. The court in speaking on this subject says "that goods are on deposit in the depots of the company either awaiting transportation or delivery, and that the section (now under consideration) has reference only to goods which have been transported and placed in the company's depots for delivery to the consignee." To the same effect is a decision of the court of appeals of New York (*Mills v. Michigan Central R. R. Co.*, 45 *N. Y.* 626), in a suit brought to recover for the loss of goods by the same fire that consumed the wool in this case, and which were marked for conveyance by the same line of propellers on Lake Erie.

It is insisted, however, by the plaintiffs in error, if they are not relieved from liability as carriers by the provisions of their charter, that the receipt taken by the consignor, without dissent, at the time the wool was

Michigan Central R. R. Co. v. Mineral Springs Manufacturing Co.

received, discharges them. The position is, that the unsigned notice printed on the back of the receipt is a part of it, and that, taken together, they amount to a contract binding on the defendants in error.

This notice is general, and not confined, as in the section of the charter we have considered, to goods on deposit in the depots of the company awaiting delivery. It is a distinct announcement that all goods and merchandise are at the risk of the owners thereof while in the company's warehouses, except for such loss or injury as may arise from the negligence of the agents of the company. The notice was doubtless intended to secure immunity for all losses not caused by negligence or misconduct during the time the property remained in the depots of the company, whether for transportation on their own line or beyond, or for delivery to consignees. And such will be the effect if the party taking the receipt for his property is concluded by it. The question is therefore presented for decision whether such a notice is effectual to accomplish the purposes for which it was issued.

Whether a carrier when charged upon his common law responsibility can discharge himself from it by special contract, assented to by the owner, is not an open question in this court, since the cases of the *New Jersey Steam Navigation Company v. Merchants' Bank*, 6 *How.*, and *York Company v. Central Railroad*, 8 *Wall.* In both of the cases the right of the carrier to restrict or diminish his general liability by special contract, which does not cover losses by negligence or misconduct, received the sanction of this court. In the case in *Howard* the effect of a general notice by the carrier seeking to diminish his peculiar liability was also considered, and although the remarks of the judge on the point were not necessary to the decision of the case, they furnish a correct exposition of the law on this much controverted subject.

Michigan Central R. R. Co. v. Mineral Springs Manufacturing Co.

In speaking of the right of the carrier to restrict his obligation by a special agreement, the judge said: "It by no means follows that this can be done by any act of his own. The carrier is in the exercise of a sort of public office, from which he should not be permitted to exonerate himself without the assent of the parties concerned. And this is not to be implied or inferred from a general notice to the public, limiting his obligation, which may or may not be assented to. He is bound to receive and carry all the goods offered for transportation, subject to all the responsibilities incident to his employment, and is liable to an action in case of refusal. If any implication is to be indulged from the delivery of the goods under the general notice, it is as strong that the owner intended to insist upon his rights and the duties of the carrier as it is that he assented to their qualification. The burden of proof lies on the carrier, and nothing short of an express stipulation by parol or in writing should be permitted to discharge him from duties which the law has annexed to his employment."

These considerations against the relaxation of the common law responsibility by public advertisements, apply with equal force to notices having the same object, attached to receipts given by carriers on taking the property of those who employ them into their possession for transportation. Both are attempts to obtain, by indirection, exemption from burdens imposed in the interests of trade upon this particular business. It is not only against the policy of the law, but a serious injury to commerce to allow the carrier to say that the shipper of merchandise assents to the terms proposed in a notice, whether it be general to the public or special to a particular person, merely because he does not expressly dissent from them. If the parties were on an equality in their dealings with each other, there might be some show of reason for assuming acquiescence

Michigan Central R. R. Co. v. Mineral Springs Manufacturing Co.

from silence, but in the nature of this relation equality does not exist, and, therefore, every intendment should be made in favor of the shipper when he takes a receipt for his property with restrictive conditions annexed, and says nothing, that he intends to rely upon the law for the security of his rights.

It can readily be seen, if the carrier can reduce his liability in the mode proposed, he can transact business on any terms he chooses to prescribe. The shipper, as a general thing, is not in a condition to contend with him as to terms, nor to wait the result of an action at law in case of refusal to carry unconditionally. Indeed, such an action is seldom resorted to, on account of the inability of the shipper to delay sending his goods forward. The law, in conceding to carriers the ability to obtain any reasonable qualification of their responsibility by express contract, has gone as far in this direction as public policy will allow. To relax still further the strict rules of common law applicable to them, by presuming acquiescence in the conditions on which they propose to carry freight when they have no right to impose them, would, in our opinion, work great harm to the business community.

The weight of authority is against the validity of the kind of notices we have been considering. See 2 *Pars. on Cont.* 238, note N, 5th ed.; and the American note to *Coggs v. Bernard*, 1 *Smith L. Cas.*, 7th Am. ed.; *Redf. on Rail.* 16; *McMillan v. Michigan Southern, &c. R. R. Co.*, 109, and following. And many of the courts that have upheld them have done so with reluctance, but felt themselves bound by previous decisions. Still they have been continued, and this resistance has provoked legislation in Michigan, where this contract of carriage was made, and the plaintiffs in error have their existence. By an act of the legislature passed after the loss in this case occurred, it is declared that no railroad company shall be permitted to

Wood v. Milwaukee, &c. R. Co.

change or limit its common law liability as a common carrier by any contract or in any other manner except by a written contract, none of which shall be printed, which shall be signed by the owner or shipper of the goods to be carried." *Mich. Comp. Stat. of 1871*, p. 783, § 2386.

It is fair to infer that this kind of legislation will not be confined to Michigan if carriers continue to claim exemption from common law liability through the medium of notices like the one presented in defense of this suit.

These views dispose of this case, and it is not necessary to notice particularly the instructions which the court below gave to the jury. If the court erred at all, it was in charging more favorably for the plaintiffs in error than the facts of the case warranted.

BY THE COURT.—Judgment affirmed.

WOOD v. THE MILWAUKEE & ST. PAUL
RAILWAY COMPANY.

27 Wisconsin, 541.

Supreme Court of Wisconsin; January Term, 1871.

Carriers. Connecting lines. Where goods in course of transportation must pass over the routes of several carriers between the point of shipment and their destination, a railway company which undertakes to convey them over a portion only of the route, and deliver them to the connecting carrier, is liable for the goods as a common carrier only until they are ready for delivery to such connecting carrier, and the latter has had a reasonable time to take them away. The connecting carrier is the agent of the owner or consignee to receive

Wood v. Milwaukee, &c. R. Co.

the goods. If they are not removed by him within a reasonable time, and are afterwards destroyed while in possession of the first carrier, the latter is liable only as warehouseman.

Such reasonable time for the connecting carrier to remove the goods is the earliest practicable time after the first carrier is ready to deliver them; it is not to be measured by any peculiar circumstances in the condition of the connecting carrier, rendering a longer time necessary for his convenience.

Where goods ready for delivery by a railway company to a connecting carrier are destroyed, it is a question for the jury to say, from the circumstances of the case, subject to the principles above stated, whether a reasonable time had elapsed for the removal of the goods by the connecting carrier.

Appeal to the supreme court of Wisconsin from the circuit court for Dane county.

This was an action to recover the value of certain merchandise transported by the defendant, and destroyed by fire while in the defendant's warehouse awaiting transportation by another carrier. The facts are fully stated in the opinion.

Upon the trial, a verdict was rendered for the plaintiff; and from the judgment thereupon the defendant appealed.

John W. Carey, for the appellant.

Gregory & Pinney, for the respondent.

LYON, J.—The plaintiff shipped from Boston and New York forty-one packages of merchandise consigned to himself at Winona, Minn. At Watertown, in this state, these packages were delivered to the defendant—thirty-five of them on May 12, 1870, and the remaining six packages on the day following—for transportation to La Crosse, which was the western terminus of defendant's line of railway; and they were transported by defendant to La Crosse—the

Wood v. Milwaukee, &c. R. Co.

thirty-five packages reaching there on the morning of May 13, and the other six packages on the following morning.

It was the custom and usage of the defendant to forward from La Crosse all goods consigned to Winona, by the steamboat "Keokuk," a boat owned and operated by the "Northwestern Union Packet Company," which company was a common carrier on the Mississippi river. The Keokuk made daily trips from La Crosse to Winona and back to La Crosse, usually leaving the latter place at 8 A. M., and returning there at about 7.30 P. M. On her return she was accustomed to receive from the defendant all freight for Winona which was ready for shipment, sometimes taking it on board in the evening and sometimes not until the following morning.

Between the railroad track and the river, at La Crosse, there were certain warehouses owned and controlled by the defendant, from which goods were shipped on board the Keokuk, and other steamers, and into which goods were received from such steamers. All goods received into such warehouses were distributed to different portions thereof, according to their destination. A portion of each warehouse was devoted to freight consigned to Winona, and such portion was designated by a sign or card attached to that part of the building labeled "Winona." Soon after the arrival of the plaintiff's goods at La Crosse, and on the same day, they were taken from the cars by the defendant, and placed in one of these warehouses, in the part thereof so set apart for Winona freight, for shipment on the Keokuk. The defendant had no interest whatever in the packet company which owned and operated the Keokuk, and there was no special contract between the plaintiff and the defendant concerning the transportation of these goods from Watertown to La Crosse.

Wood v. Milwaukee, &c. R. Co.

The custom and usage of business at La Crosse, between the defendant and the Packet Company, in respect to the shipment of goods arriving there by the defendant's railroad, and consigned to points on the river, was briefly as follows: On the arrival of such freight, the way bills accompanying the same were copied into the in-freight book of the defendant, and entered by the yard master in the train book. The freight was then checked into the warehouse of the defendant, and distributed to its appropriate place therein, according to its destination. Bills of lading for the consignees were then made out from such way bills, and from these bills of lading two tally-books were made—one for the check clerk of the defendant, and the other for the steamboat which might take the goods; and then the freight was ready to be delivered to the steamboat. This was all done by the employees and agents of the defendant.

The goods were then taken from the warehouse by the employees of the packet company, and placed on the boat, the second clerk of the boat and the check clerk of the defendant attending with the tally-books to verify the correctness of the shipment. After the freight was on board, the clerk of the boat signed each page of the manifest book, which had previously been made by copying into it the bills of lading of the goods thus shipped, and was furnished with a copy thereof. After the freight was deposited in its appropriate place in the warehouse, it was handled entirely by the crew of the steamboat. It was not the custom and usage for the agents of the defendant to give actual notice to the packet company of the arrival of freight at La Crosse, for different points on the river; but the boats called at the warehouse of the defendant for such freight on their regular trips, taking all that was ready for shipment.

It would seem, from the testimony, that the goods

Wood v. Milwaukee, &c. R. Co.

of the plaintiff which had then arrived were not ready for delivery on board the Keokuk when she left for Winona on Saturday morning, May 14, because the bills of lading and manifest thereof had not been made. They were completed, however, as respects the thirty-five packages, when the boat returned that evening. The remaining six packages were never manifested.

The Keokuk returned to La Crosse at the usual time on Saturday evening, unloaded her down freight, and, after doing some towing, laid up at a wharf near where another steamboat, the "War Eagle," was taking on freight from the warehouse in which plaintiff's goods were stored. While the two remained in this position, and about one o'clock in the morning of Sunday, May 15, the War Eagle took fire, the flames communicated to the warehouse, and the same and all its contents, including the goods of the plaintiff, were speedily consumed.

This action was brought to recover the value of these goods, and the plaintiff had a verdict and judgment in the circuit court. The defendant has appealed from such judgment to this court.

It is freely conceded that the goods were not lost through any fault or negligence of the defendant or its agents or employees; and that, unless the defendant can be held liable for the loss as a common carrier, it cannot be held liable at all.

The position of the plaintiff is, that there was no suspension of the liability of the defendant as a common carrier in respect to the goods of the plaintiff after they arrived at La Crosse; that such liability necessarily continued until the goods should actually be delivered to the packet company; and that, inasmuch as they were destroyed before such actual delivery, the defendant is liable to the plaintiff for their value.

The circuit court judge adopted this view of the law; and while he submitted it to the jury as a ques-

Wood v. Milwaukee, &c. R. Co.

tion of fact, whether there had been an actual delivery of the goods by the defendant to the packet company, he instructed them that either the defendant or the packet company was liable for the goods as a common carrier; that there was no evidence which would authorize them to find that the liability of the defendant was that of a warehouseman only; and that, after the goods were placed in the warehouse, there was no suspension of the strict liability of a common carrier in respect thereto.

The position of the defendant is, that after the plaintiff's goods were unloaded from the cars and placed in that portion of the warehouse set apart for Winona freight, ready to be taken therefrom by the connecting carrier, the Northwestern Union Packet Company, as was the uniform custom and usage in such cases, the liability of the defendant as a common carrier ceased, and from thenceforth, if liable at all, it was only as a warehouseman and forwarder, and not as a common carrier.

Conceding, for the purposes of the argument, that the placing of the goods in the warehouse in the portion thereof from which the connecting carrier was accustomed to take goods consigned to Winona, was notice to such carrier that they were there awaiting transportation by its boat to Winona, and conceding also that the bills of lading, tally-books, and manifests had been made, and that the goods were ready to be put on board the Keokuk, and were so ready before that boat returned to La Crosse on Saturday evening before the fire, still there is no evidence of an actual delivery of the goods to the packet company. At the time they were burned, no bill of lading or tally-book thereof had been delivered to, and no manifest had been signed by the agents of the packet company; neither had that company exercised any control over the property. The goods were held by the defendant either in the

Wood v. Milwaukee, &c. R. Co.

capacity of a common carrier or in that of a warehouseman. The most that can be successfully claimed by the defendant is, I think, that the goods were in its warehouse ready to be delivered to the Packet Company whenever its boat should call for them.

However the fact may be, there is certainly evidence tending to show that the thirty-five packages which arrived at La Crosse on Friday morning, were ready, before they were consumed, for delivery to the Packet Company.

On this state of facts, the controlling question which we are to determine is, whether the undisputed evidence demonstrates that the defendant is necessarily chargeable as a common carrier for the loss of the plaintiff's goods. If it is so chargeable, the judgment of the circuit court should be affirmed. If it is not necessarily so chargeable, then such judgment should be reversed.

The liability of a common carrier of goods after they have reached their destination and are waiting delivery to the owner or consignee, has been adjudicated by this court in *Wood v. Crocker*, 18 *Wis.* 345. It is held in that case, that where goods are transported by a railroad company to the place of consignment, and there deposited in its warehouse, the liability of such company as a common carrier in respect to such goods does not thereby cease, but continues until the same are ready for delivery to the owner or consignee thereof, and until he has had a reasonable opportunity to take them away.

There is doubtless much conflict of authority on this subject, but the rule there adopted was thought by the court to be sustained by the sounder reason, and to accord best with well-settled principles of public policy. We are not disposed to disturb that rule, and it is entirely unnecessary to refer to the authorities which hold a different doctrine.

I think that the same rule should be applied here.

Wood v. Milwaukee, &c. R. Co.

I can see no difference in principle between a case where the transit is ended and the carrier holds the goods for delivery to the owner or consignee, and one where the carrier conveys the goods over a portion only of the route, and holds them for delivery to some connecting carrier. For the purpose of receiving such delivery, I think the connecting carrier must be held to be the agent of the owner. *Schneider v. Evans*, 25 *Wis.* 241. I find no adjudicated case which makes any such distinction, although in *McDonald v. Western Railroad Corporation*, 34 *N. Y.* 497, Mr. Justice HUNT does say that there is an important difference. This is a mere passing remark, however, no explanation of the grounds of difference being stated, and no authority cited in support of the proposition. Besides, the question as to whether ~~any such difference~~ existed was of very small significance in that particular case. It is true, the defendant in that case was held liable as a common carrier; but had this been ruled otherwise, the carrier was evidently guilty of gross negligence in not forwarding the goods in due time, and would doubtless have been held liable as a forwarder for the value of the lost goods.

The cases cited by counsel for the plaintiff to show that the liability of the carrier, as such, does not cease until an actual delivery of the goods to the next carrier, fail, I think, to establish that proposition.

McDonald v. Western Railroad Corporation, *supra*, and *Goold v. Chapin*, 20 *N. Y.* 259, assert the opposite doctrine. See opinions of SMITH, J., in the former case, p. 502, and of STRONG, J., in the latter case, p. 267.

In *Miller v. Steam Navigation Co.*, 10 *N. Y.* 431, and in *Hooper v. Chicago, &c. R. R. Co.*, 27 *Wis.* 81; and also in *Goold v. Chapin*, *supra*, it was held that the transit was not ended. In *Blossom v. Griffin*, 13 *N. Y.* 569, and in *Ladue v. Griffith*, 25 *Id.* 364, the goods had been delivered to the carrier for trans-

Wood v. Milwaukee, &c. R. Co.

portation, and were destroyed *before* the transit commenced.

Lawrence v. Winona & St. Peter's R. R., decided by the supreme court of Minnesota and yet unreported, seems to turn upon the point that the railroad company had made a contract with some person to give him the exclusive transportation of all of the freight received by it, for the point to which the goods of the plaintiff in that action were consigned, not to be transported by such person at stated times, but only when a certain quantity of freight had accumulated; and that, before the specified quantity had accumulated, and five days after the goods were placed in the warehouse of the railroad company, they were destroyed by fire. The company was held liable as a common carrier, because under such contract it had deprived itself of the right to forward the goods. But it is not held in that case that the liability of the carrier, as such, must necessarily continue until the goods are actually delivered to the next carrier. Hence, whatever some of the judges may have said in their opinions, none of these cases decide that the liability of the carrier, as such, necessarily continues until an actual delivery of the goods to the next carrier.

I refer to these cases to show that they are not necessarily in conflict with the rule which we adopt in this case. Indeed, all of the cases seem to agree that when the carrier who conveys the goods gives notice to the next carrier to take them, if the latter fail to do so within a reasonable time, the former may place them in his own warehouse, and from that time his liability is only that of a warehouseman. None of these cases hold that such notice to the next carrier must be an actual written or verbal notice. The better opinion seems to be, that the notice may be implied from the course of dealing between the parties, or from the custom and usage of the business. But the case of *Wood v.*

Wood v. Milwaukee, &c. R. Co.

Crocker, *supra*, does not require that notice shall be given to the owner or consignee of the arrival of the goods, before the strict liability of a common carrier shall cease. It is sufficient if the goods are ready for delivery, and the reasonable time for the owner to remove them has elapsed.

In the latter case, Justice COLE explains what is a "reasonable time" or "reasonable opportunity" to remove the goods. Keeping in mind the proposition that the Packet Company was the agent of the plaintiff to receive his goods from the defendant, that explanation, as applicable to this case, is, that the Packet Company was bound to remove the goods from the warehouse of the defendant at the earliest practicable time after the defendant was ready to deliver them, and such time is not to be measured by any peculiar circumstances in the situation or condition of the Packet Company rendering necessary for its convenience that it should have a longer time or a better opportunity to take the goods. It was part of the implied contract for transportation between the plaintiff and the defendant, that the Packet Company should receive the goods at La Crosse at the earliest practicable time after the defendant was ready to deliver them, and if such time had elapsed before they were burned, and the packet company was not ready to receive them, then and in such case the defendant held them under the more limited liability of a warehouseman at the time they were destroyed. Subject to these legal principles it is for the jury to say, from all of the circumstances of the case as proved upon the trial, whether such reasonable time to remove the goods had elapsed before they were burned.

I have already said that the controlling question in the case is: Does the uncontradicted evidence demonstrate that the defendant is necessarily chargeable as a common carrier with the loss of the plaintiff's goods? In the light of the propositions of law which have been

Wood v. Milwaukee, &c. R. Co.

stated, I think that this question must be answered in the negative. The testimony fails to inform us at what precise time the thirty-five packages which reached La Crosse on Friday morning were ready for delivery to the packet company; and it also fails to show for whose convenience the War Eagle was first loaded on Saturday evening; but it tends to show, as already stated, that the thirty-five packages were ready for delivery on board the Keokuk when she returned to La Crosse on Saturday evening. I am of the opinion that it should have been left to the jury to say whether any part of the goods were ready for delivery, and if so, whether, under all of the circumstances, the packet company had a reasonable time, before the fire, within which it might have removed the goods from the warehouse of the defendant.

That portion of the charge of the court to the jury to which these observations are mainly applicable, is as follows: "There is no evidence before you from which you would be authorized to find that the liability of the defendant was that of a warehouseman simply; nor is there any evidence from which you would be authorized to find that from the time the goods were placed in the warehouse until they were taken by the boats, there was any intervening liability as for warehousing, or any suspension of the strict liability of common carrier. Either the railway company is liable as a common carrier, or the Northwestern Packet Company is so liable."

For the reasons already stated, we think that this portion of the charge was erroneous.

I am of the opinion, also, that the fourth and fifth instructions asked on behalf of the defendant and refused by the court, should have been given. They are as follows:

"4. The plaintiff is presumed to have known the usages and general course of business prevailing be-

Conkey v. Milwaukee, &c. R. Co.

tween the defendant and the next succeeding carrier, as to notice of arrival of goods and delivery for further carriage, and he is bound by them.

"5. The defendant was not bound to do any act further than in conformity to such usage, in the way of notice or tender of the goods to the next succeeding carrier."

I think that the learned counsel for the defendant, in his very able argument, has demonstrated that these propositions are fully sustained by the authorities.

BY THE COURT.—The judgment is reversed, and the cause remanded for a new trial.

CONKEY v. THE MILWAUKEE & ST. PAUL RAILWAY COMPANY.

Supreme Court of Wisconsin; 1873.

Carriers. Connecting lines. Where goods in course of transportation must pass over the routes of several carriers between the point of shipment and their destination, a railway company which undertakes to convey them over a portion only of the route, and deliver them to the connecting carrier, is liable for the goods as a common carrier, not only while they are in actual transit over its line of railway, but until an actual delivery of them to the connecting carrier.

The cases of *Schneider v. Evans*, 25 Wis. 241, and *Wood v. Milwaukee, &c. R. Co.*, 27 *Id.* 541, and *ante*, 842, bearing on this question, explained; and the decision in the latter case overruled.

It seems, that in extraordinary cases, as where a break or interruption in the line of transit, or the fact of war, render it impossible to send the goods forward, or make considerable delay in the transportation necessary, the carrier may store the goods and at once give notice to the consignee or owner, and will then be absolved from liability as carrier.

Conkey v. Milwaukee, &c. R. Co.

Appeal to the supreme court of Wisconsin.

This was an action to recover the value of goods destroyed under circumstances similar to those of the case immediately preceding. *Wood v. Milwaukee, &c. R. Co.*, *ante*, 342. The questions presented were identical with those considered in that case. The facts necessary to be stated are as follows:

The defendant operated its railway between Milwaukee and La Crosse. It received at Milwaukee goods addressed to the plaintiffs at Preston, Minnesota, to be carried over its line of road to La Crosse, and there delivered to the Southern Minnesota Railroad Company, the next succeeding carrier in the line of carriage. The goods were so transported over the defendant's line of road to La Crosse, arriving there on May 12, 13, and 14, 1871. They were placed in defendant's warehouse for delivery to the Southern Minnesota Railroad Company, and while so awaiting carriage were destroyed by fire on the night of May 15.

John W. Carey, for the appellant.

Jenkins & Elliott, for the respondents.

DIXON, Ch. J.—The learned counsel for the railway company asked permission at the bar, and the request was also joined in by counsel for the plaintiff, and leave was granted by the court, to reargue the point decided in *Wood v. Railway Company*, 27 Wis. 541, that where a common carrier conveys goods over only a portion of the route between the places of shipment and consignment and holds them for delivery to some connecting carrier, the liability of the former as a common carrier continues until the goods are ready for delivery to the connecting carrier and until the latter has had a reasonable time to take them away. The

Conkey v. Milwaukee, &c. R. Co.

"reasonable time" as there defined was said to be the earliest practicable time after the first carrier is ready to deliver, and is not measured by any peculiar circumstances in the condition of the second carrier, requiring for its convenience that it should have a longer time.

Against the rule thus laid down, counsel on both sides in this case, as well as in some others involving the same question, most earnestly and vehemently protest on account of the great uncertainty which must exist in its application to particular cases, and the likelihood of most tedious and expensive litigation which may follow in determining the rights of the owner of the goods or the liability of the carrier in almost every such case of loss. Counsel say, and say truly, that the inquiries of fact upon which the issue is made to depend, are of the most equivocal, perplexing, and doubtful character, such as the parties will seldom agree upon, and such as will often divide a jury. They say that the expression, "reasonable time," is suggestive of the most embarrassing vagueness and uncertainty, opening wide the door to speculation and diversity of opinion in many cases, and that where one jury may say "yes," another upon the very same state of facts may answer "no," whilst a third may fail to agree altogether. Counsel cry out against this uncertainty, these doubts and embarrassments, and pray that whatever rule may be established, it may be a certain one, freed from these difficulties, and plain and easy of application. It is equally argued on both sides that the rule contended against is a departure from the true principles or policy of the law in such cases.

For the railway company the position assumed is that its liability as carrier should cease whenever the goods are removed from its cars, and thenceforth it should be responsible to the owner for the property in its possession only in the character or capacity of a warehouseman or a depositary for hire. This is the

Conkey v. Milwaukee, &c. R. Co.

rule in some states, and it has the advantage of that convenience and certainty of application for which counsel contend.

On the other hand, the position taken by counsel for the plaintiff is that the removal and deposit of the goods in the warehouse, preparatory to a delivery of them to the next carrier and for that purpose is a part, and a necessary and indispensable part, according to the method of transportation and conveyance adopted and in use by railway companies and some other carriers, of the act of carriage itself, and that the liability of the last carrier, as such, does not, under ordinary circumstances, cease until the goods have been actually delivered to, or placed in the custody and control or under the management and direction of the next carrier, so that the liability of a common carrier shall have attached to the latter in case of the loss or destruction of the goods from any cause not exempting a common carrier from responsibility. The position assumed in this behalf is that the warehousing, so called, of goods thus in transit over different connecting routes, and which have not reached their place of destination or ultimate delivery, is merely incidental and subsidiary to the principal or main act of carriage, and a part of that act. With respect to goods and property so on the way or going forward, the position, except under extraordinary or peculiar circumstances, recognizes no such thing as an interruption of a common carrier's liability or of the protection afforded by that principle of the common law so far as it respects the rights and remedies of the shipper or owner of the goods. The position rejects entirely the doctrine, as to goods thus in the ordinary course of transit, that the common carrier in whose possession they are, may be now a common carrier and now only a warehouseman, according as the goods may be in motion in the cars or other vehicles, or at rest upon a platform or in a depot or

Conkey v. Milwaukee, &c. R. Co.

other place of temporary deposit. It ignores entirely the assumption that as to such goods and under such circumstances the carrier can become a mere warehouseman and liable only in that capacity to the shipper or owner, but declares that as to him the character or capacity of common carrier remains unchanged with the possession of the goods, and until the same has been parted with by delivery to the next carrier. It regards depots and other buildings erected by the carrier in which goods passing over the route are thus temporarily housed and protected from loss or damage by the elements as well as from the depredations of thieves and trespassers, as structures for convenience merely of the carrier himself, or not only convenient but essential to his business as a carrier during these pauses or rests made necessary by the system or mode of transportation which now almost universally prevails. It looks upon the warehouses and other buildings and places for storage merely as concomitants of the carrying business, auxiliary and subservient thereto, but not as giving the carrier any distinct or separate character or business with respect to the goods so *en route* and in his possession and custody. It holds the warehouses of railway companies as structures designed to facilitate their business as carriers, by enabling the companies to carry out a system of separation, classification, and delivery of goods received and carried, without which there would be no possibility of conducting their carrying business with the requisite precision and despatch, or with any ease or profit.

Such are some of the views, briefly expressed and in my own language, which were urged by the learned counsel for the plaintiff, and such is the rule they would have the court sanction and adopt as the true and sound one in the law. It will be seen, too, that this rule has the same advantage of certainty and of convenience and

Conkey v. Milwaukee, &c. R. Co.

clearness of application as that propounded and urged by counsel for the railway company.

I must say that I was very forcibly impressed by the arguments on both sides made at the bar, and such was the interest awakened in my mind that I at once gave the question an attentive and thorough examination, as much so, at least, as my time and capacity, and the means at hand, would permit. I came to the conclusion with counsel on both sides that the rule of *Wood v. Railway Company* could not and ought not to stand, and that, as is most apt to be the case with middle grounds, often of doubtful policy, and more often of dangerous tendency to sound principle, it failed in that clearness, certainty, and convenience of application which the true principles of law require and which is indispensable to the facility, safety, and confidence of business transactions, and of all commercial dealings and traffic constantly taking place over these great connecting routes of trade and communication. I became satisfied, that however, in the various and multiplied turns and complications of human affairs and relations, doubts and uncertainties inhere in and are inseparable from some legal rules, this was a case where they ought not to exist. The rule here, whatever it is, should be defined and certain in its application to all ordinary cases. There is no inherent difficulty in making it so, and the immense interests of the carrying business of the country, as well as of trade and commerce, peremptorily demand it. In the multitude and importance of cases so frequently arising, and which must ever thus continue, parties cannot be delayed to palter and trifle, as it were, in a delusive struggle for their rights over nice distinctions of fact and fine shades of difference, which fade away into regions of obscurity, and finally of total darkness, and which facts, when settled, settle nothing after all but the particular case, leaving all others to be con-

Conkey v. Milwaukee, &c. R. Co.

tested and litigated over and over again upon the very same grounds. I agree, therefore, with counsel on both sides, when they say the expenses attending this course of decision, or the litigation which must follow, would be enormous, and that this alone, without considering the other inconveniences and mischiefs to which allusion has been made, is sufficient to condemn the rule. I agree that any rule unnecessarily fraught with such evil consequences is a bad one, and should be abandoned. This is another of the numerous actions springing from the same unfortunate loss or destruction of property, as in *Wood v. Railway Company*.

The question comes up, therefore, which of the two rules propounded by counsel is the correct one and ought to be adopted, for I conceive that I must in this case act upon and determine the rights and liabilities of the parties according to one or the other. In *Wood v. Railway Company*, I assented to the rule laid down not because I thought there was or could be, under ordinary circumstances, a pause or cessation in the common carrier liability with respect to the consignee or owner of the goods, during such temporary rest and storage of them preparatory to delivery to the next carrier, and during which also there would spring up and exist only a warehouseman's or forwarder's liability, but I did so on the supposition that the carrier's liability was to be continuous until the goods reached their place of final destination, and where they were to be delivered to the consignee or owner. My supposition and view was that the liability of the next carrier in the connecting line or route, *as a carrier*, would attach the very moment that of the last carrier, as such, would cease. In other words, I considered that whenever the liability of the last carrier, as such, ceased by lapse of reasonable time for the next carrier to receive and carry forward the goods according to the usual course of transportation and business after the goods were

Conkey v. Milwaukee, &c. R. Co.

ready for delivery to him, the liability of the latter as a carrier attached, and he must be held to respond to the consignee or owner for their value in case of the subsequent loss or destruction of them. Such was my consideration of the question, and I placed it, not upon the ground that the next carrier had become or was in any sense the agent of the consignee, owner, or shipper of the goods, and in that character responsible to him for not receiving and carrying them forward ; but upon the ground of the usage and custom among carriers so related to and connected with each other in the business of transportation that their lines or routes, though separately owned and managed, yet running into and touching or uniting one with another in practical operation and effect, constitute one continuous route. The usage among carriers so connected or joining their routes, in the absence of special contract or special notice to the contrary, is not only well known in commercial and business circles, but is also known and acted upon by the courts. Courts recognize and give force and effect to it. *Schneider v. Evans*, 25 *Wis.* 241, and cases there cited. That usage, now become universal or very nearly so, is for the railway company, receiving the goods destined for a place beyond the terminus of its own route, to transport them over its own road and there deliver them to the next company or carrier in the line of transit, collecting from the latter its own charges for freight and transportation, whereupon the latter becomes invested with a lien upon the goods for the charges so advanced in addition to his rates or charges for the transportation or delivery to the next succeeding carrier, who, in turn advances the charges of the two that have preceded him, and thus the process continues and is repeated until the goods have reached their place of destination and are in the hands of the last carrier ready for delivery to the consignee or owner, subject to payment to such carrier of

Conkey v. Milwaukee, &c. R. Co.

the accumulated charges of all the preceding carriers over whose routes they have been transported.

Now, it was upon this well-known custom and usage, amounting, as it does, to an implied contract or promise on the part of each succeeding carrier to pay back charges and receive and carry forward the goods brought to it by the preceding one, that I relied as constituting the true ground of action or liability against the succeeding carrier in case he unreasonably failed to receive and carry forward the goods according to his implied contract or obligation, and as he had held himself out as ready and willing, and promising to do. That contract or obligation I then thought, and still think, created a liability on his part, coextensive with and similar in nature to his liability as a common carrier, in case he neglected or refused, in proper time and according to the usual course of business, to receive the goods, and they were afterwards and before coming to his possession lost or destroyed. I then looked upon his liability, and still do, as being in extent the same as if the loss or destruction had been of the goods in his custody and possession as a common carrier. It was to my mind like the case of goods delivered to a carrier for transportation, and which were destroyed before the transit commenced. By the law of common carriers, their liability is fixed on receipt of the goods, and if they are lost in the warehouse of the carrier or elsewhere before the carriage commences, the carrier must respond, unless the loss was caused by a force superior to and beyond human agency and foresight, or by the public enemy, the *onus* of showing which is upon the carrier. *Blossom v. Griffin*, 13 *N. Y.* 569; *Ladue v. Griffith*, 25 *Id.* 364. I regarded the goods when separated and set apart in the accustomed place in the warehouse, and ready for delivery by the preceding carrier, and after a reasonable time had elapsed for the succeeding one to receive them, and

Conkey v. Milwaukee, &c. R. Co.

when in the due course of business he should have done so, as being *pro hac vice*, if need be, in the warehouse of the latter awaiting transportation by him, or, if necessary for the purpose of the remedy, constructively in his possession as a common carrier.

Such were the views which I then entertained, and I have as yet discovered no good reason for changing them. I then thought, and still think, that the loss, if possible, should be made to fall on the carrier in fault, or him who appeared most so, and it was for this reason I assented to the rule that the last carrier should be held responsible, as such, only until a reasonable time had elapsed for the next carrier to receive the goods, and not after that time. I was not disposed to make the last carrier responsible, without remedy, for the faults and delinquencies of the next, over whose movements and conduct he had no control. It was upon this principle I yielded assent to the rule, and it did not occur to me then there was any better or more satisfactory solution of the difficulty.

It will be seen hence I did not assent to the rule on the ground that the next carrier was the agent of the owner for the purpose of receiving such delivery, which seems quite impossible. The agency in such cases springs from the possession of the goods in the hands of a carrier marked for some place beyond the terminus of his own route. Such carrier, from the fact of possession, becomes the agent of the owner for the purpose of making or tendering delivery of the goods to the next in the proper line of transit. By the usage of the business in which he is engaged he assumes to do that when he receives the goods, and it may properly enough be said to constitute a part of his undertakings as carrier. The decision in *Schneider v. Evans*, means just this and nothing more, and Mr. Justice LYON himself now concedes the error in the application. Had

Conkey v. Milwaukee, &c. R. Co.

particular attention been directed to it at the time, it would undoubtedly have been corrected.

But the difficulties in the way of applying the rule are manifest and manifold. It casts upon the owner of the goods the burden and the risks of settling the rights and liabilities as between the different carriers. It imposes upon him a task which in nearly every case he will have no adequate or proper means of performing. He is often a stranger, residing in a distant part of the country, and wholly unacquainted with the facts. Actual knowledge of the facts and of the particular system or mode of transacting the business, rests only with the agents and employees of the carriers, and being adversely interested, it is not to be expected they will be free to communicate what they may know. Indeed, it must be presumed they will refuse to give information of facts which will charge their employers, if they know such facts.

And a result of the rule may be to deprive the owner of all remedy for the loss or destruction of his property after he has mulcted himself in two heavy bills of costs. He may come out like Mr. Bromley with his portmanteau, with no right of action against either carrier. *Midland Railway Co. v. Bromley*, 8 *J. Scott*, 372; 84 *E. C. L.* 372, 382, note *c*. A verdict and judgment in an action against the last carrier settles nothing in a suit against the next. In an action against the last the jury may find that a reasonable time had elapsed, and in a suit against the next they may find the reverse, and so the owner falls between two fires.

And again the question arises, what is the proper way out of these difficulties? I have examined not only the cases cited but very many others, and have pondered the question well, at least as well as I am capable of doing, as between the two rules laid down by counsel, neither of which is unsupported by authority, and my conclusion is that the rule contended for by counsel

Conkey v. Milwaukee, &c. R. Co.

for the plaintiff is the correct and true one. In coming to this conclusion I have anxiously endeavored to recognize a rule which, while it shall not prove injurious and embarrassing to the great commercial interests of the country, shall, at the same time, protect the interests of the carriers, or, at all events, be of so much aid and service to them that the proprietors of that interest shall know and understand with clearness and certainty the full extent of their obligations to the public.

I think in the absence of special contract or agreement to the contrary, the true policy of the law, now as much as ever, and even more, is to adhere to the strict rules of liability on the part of common carriers established by the common law. I believe the safety and protection of the trade and commerce of the country demand this, and I believe also that by the feeling of confidence and security thus created and given, the great carrying interests of the country will be likewise ultimately benefited and their prosperity promoted. I believe the true policy of the law consists with giving the owner a certain, sure, and ample remedy in case of the loss or destruction of his goods while in the hands of the carrier, and hence I reject the rule contended for by counsel for the railway company, because it is calculated to give the owner anything but such remedy. To admit the change in capacity and liability from carrier to warehouseman at every pause in the carriage over our long-connected routes, would in practice and effect be to say to the owner that he has no remedy. To recover as against a warehouseman, the burden would be upon the owner to establish the negligence. He must aver and prove that his goods were negligently lost or destroyed, which, except in very rare instances, would be an utter impossibility, even though the fact of negligence might exist. It would be better far to inform him he is without relief, than to deceive him with a remedy like this.

Conkey v. Milwaukee, &c. R. Co.

To admit such interruptions of the liability of the carrier would make clear the way for the grossest fraud and imposition, with no means of protection and no power of discovery on the part of the owner. He is always absent. He does not go with his goods, and cannot be permitted to do so. He must trust them absolutely and exclusively to the keeping of the carrier. Whether they were lost or destroyed when in motion or on the way, or while in a warehouse, he could not tell, and it would generally be a secret past his finding out. He would be wholly in the power and at the mercy of the carrier, and if the carrier said they were destroyed in a burning warehouse or depot, he must abandon all claim. This would be placing too great power in the hands as well as too great temptations in the way of carriers.

"It is well settled in this state," says Mr. Commissioner EARL in delivering the opinion of the commission of appeals in *Fenner v. Railroad Company*, 44 *N. Y.* 505, "that an intermediate carrier, one who receives goods to be transported over his route, and thence by other carriers to their place of destination, generally remains liable as a common carrier until he has delivered the goods to the next carrier. It was deemed wise policy that the principles of the common law should be so expounded and applied, that the liability of one carrier should continue until that of the next carrier commenced." The learned commissioner cites *Miller v. Steam Nav. Co.*, 10 *N. Y.* 431; *Gould v. Chapin*, 20 *Id.* 286; *La Duc v. Griffith*, 25 *Id.* 384, and *McDonald v. Western Railroad Corporation*, 34 *Id.* 497, and then proceeds with a quotation of the language of Chief Justice JOHNSON in *Gould v. Chapin*, as follows: "No owner can be supposed to have an agent to superintend such transshipment of his goods, in the course of a long line of transportation; and if the responsibility of each carrier is not continued until delivery in fact to the next

Conkey v. Milwaukee, &c. R. Co.

carrier, or at least until the first carrier, by some act clearly indicating his purpose, terminates his relation as carrier, we shall greatly diminish the security and convenience of those whose property is necessarily abandoned to others, with no safeguards save those which the rules of law afford."

And next the commissioner quotes the language of Judge SMITH in *McDonald v. Western Railroad Corporation*, which is this: "The owner loses sight of his goods when he delivers them to the first carrier, and has no means of learning their whereabouts till he or the consignee is informed of their arrival at the place of destination. At each successive point of transfer from one carrier to another, they are liable to be placed in warehouses, there, perhaps, to be delayed by the accumulation of freight, or other causes, and exposed to loss by fire or theft, without fault on the part of the carrier or his agents. Superadded to these risks, are the dangers of loss by collision, quite as imminent while the goods are thus stored at some point unknown to the owner as while they are in actual transit. As a general rule, the storing under such circumstances should be held to be a mere accessory to the transportation, and the goods should be under the protection of the rule which makes the carrier liable, as an insurer, from the time the owner transfers their possession to the first carrier till they are delivered at the end of the route."

And here it occurs to me to observe that among the great number of such cases which have arisen and been adjudicated by the courts of New York, not one has yet been presented where the intermediate carrier has been exonerated from liability as a carrier for goods lost or destroyed while in store or on deposit by such carrier. The case of *Mills v. Railroad Company*, 45 N. Y. 672, cited by counsel for the plaintiff in this action, would seem to have been a pretty strong one for declaring an exception, but yet the court refuses.

Conkey v. Milwaukee, &c. R. Co.

The case of an *adjudicated* exception is yet to come, for thus far the doctrine rests upon mere suggestions or hints, vaguely thrown out, and nothing more.

And the case of *Nashua Sack Company v. Railroad Company*, 48 *N. H.* 339, is a most elaborate and powerfully reasoned one, many of the arguments and views of which very strongly favor my conclusion. It contains a review and examination of most of the leading authorities, English and American, and a statement of the doctrines of the courts on both sides of the Atlantic. I must say that I think Mr. Chief Justice PERLEY performed a very great and valuable service, both for the profession and for the law, when he wrote that opinion.

And the case of *Baxter v. Wheeler*, 49 *N. H.* 6, is another case most elaborately and well considered, as is the manner of that court, which also favors my views. I need only refer to these two last cases for a full and ample vindication of the principles by which I think the present one ought to be governed.

In England the question presented in this case has never to my knowledge been considered, since under the rule in *Muschamp's Case*, 8 *Mees. & W.* 421, it could not well arise. The first carrier there is liable, as such, for the safety of the goods throughout the transit and until they are delivered at the place of destination, which is of course a sufficient protection of the rights of the owner or consignee. The English rule has also, I believe, been applied in Illinois.

Now in the present case, I think the law should hold the carrier in whose possession the goods were destroyed, responsible to the owner or consignee for their value as a carrier or insurer of the goods, leaving such carrier to seek his remedy against the next carrier in the route or line of transit, in case it was the fault of the latter that the goods were not removed in due time as regulated by the course of business and the usage and practice prevailing among carriers. In this way

Conkey v. Milwaukee, &c. R. Co.

the burden of settling those hazardous and uncertain questions would be thrown upon the carriers themselves, where it belongs. They are the parties who know the facts, or have ample means of ascertaining what they are. In this way also multiplicity of actions would be saved, for as between the carriers themselves the controversy could be settled in one action. I have no doubt that upon the usage and custom above spoken of or upon the implied contract or obligation growing out of it, one carrier may maintain his action against another under such circumstances.

As I have limited the rule which I regard as the true one, to ordinary cases, or those arising under ordinary circumstances, it may be proper, perhaps, that I should suggest what would seem to me to be an extraordinary one. I should say that in a case of a break or interruption in the line of transit or communication, as by storm, flood, or earthquake, or by fact of war, rendering it impossible to send the goods forward or making considerable delay in the transportation necessary, the carrier might store the goods, and at once give notice to the consignee or owner, and thus absolve himself from liability as a carrier. Other cases of an extraordinary nature might also occur; I only suggest these.

I think the judgment should be affirmed.

COLE, J.—I concur with the chief justice in the rule of law which gives the owner or consignee the continuous liability of a common carrier while the goods are in transit, and that the judgment must be affirmed.

LYON, J.—I concur in the affirmance of the judgment of the circuit court, but am inclined to adhere to the doctrine asserted in the case of *Wood v. Milwaukee, &c. R. Co.*, 27 *Wis.* 541.

BY THE COURT.—Judgment affirmed.

Dewey v. Chicago, &c. R. Co.

DEWEY v. THE CHICAGO & NORTH WESTERN
RAILWAY COMPANY.

81 Iowa, 378.

Supreme Court of Iowa; June Term, 1871.

Fences. Negligence. In an action against a railway company to recover damages for causing the death of a conductor, the evidence showed that the fence along the railway was out of repair, and, some horses being on the track at that point, they were run into by the train in charge of the deceased, the train thrown off the track, and the conductor killed. *Held*, that although the statute of Iowa required the railway company to erect and maintain such fence, these facts did not, under that statute, constitute any ground for such an action. Nor could the railway company be held liable on the ground of negligence; the deceased being the superior officer of the train, and having directed the line of conduct which resulted in his death.

New trial. In such cases, new trials should be granted by the *nisi prius* courts whenever the verdict of the jury fails to administer substantial justice to the parties. The more limited rule which controls appellate tribunals, has no application to courts at *nisi prius*.

Appeal to the supreme court of Iowa from the circuit court for Iowa county.

This was an action by an administrator to recover damages for the death of his intestate, resulting from a train, of which the deceased was in charge as conductor, being thrown from the track of defendant's railway. The facts are fully stated in the opinion.

Upon the trial, the jury rendered a verdict for the plaintiff. From the judgment entered thereon the defendant appealed.

Dewey v. Chicago, &c. R. Co.

Henderson & Merriman, for the appellants.*Strubble & Bradshaw*, for the appellees.

COLE, J.—No complaint is made as to the correctness of the instructions given by the circuit judge to the jury who tried this cause. The only question made by the appellants' counsel, which it is necessary for us to pass upon, is as to the sufficiency of the evidence to sustain the verdict. There is no conflict in the testimony upon any material fact. The substance of the evidence is as follows: The deceased, Edwin S. Dewey, was killed by an accident occurring on the defendant's railroad, at about eight and a quarter o'clock in the evening of May 16, 1868, about two and a half miles east of State Center in Marshall county. He was about twenty-two years old at the time of his death, and was the conductor of the train on which he was killed. The train was composed of an engine, nineteen freight cars, and one way car; the deceased was conductor and superior officer of the train, and was at the time of the accident riding on the engine with the engineer, where he might, according to the rules of the company, properly ride, and the two brakemen were at their proper positions on the train. The right of way was fenced, but several horses which had been accustomed to run at large on the north side of the railroad, had been turned, on the day previous to the accident, out on the south side; and these horses had in some manner gotten on the right of way, and were standing near the north fence, about fifty rods east of a trestle, about six feet high, where the accident happened; the place where the horses were standing was on a curve of the road, and could be seen at full daylight from the engine at a point about forty-five rods east; three of the bars in the south fence, nearly opposite where the horses were standing, were down, and some of the top

Dewey v. Chicago, &c. R. Co.

boards of the fence between these and the trestle were off, and three-quarters of a mile west of the trestle, several panels were down; where the horses entered the right of way is not shown, nor does it appear that the defendant had any knowledge that the bars or fence boards were down. As the train with ordinary speed approached the horses, they started west and soon crossed the track; the deceased saw the horses before and after they crossed the track; when the engineer first saw them, he sounded the alarm and said to the deceased, "there are some horses," and the deceased said to the engineer, "pass them." The engineer testifies that when deceased said this, he did his best to pass them, and had already put on steam and was getting up as much speed as possible; that the train could not have been stopped before the trestle was reached, and their object was to catch the horses before they reached the trestle and throw them from the track; that, if a train has to strike an animal, it is best to do so with as much force or momentum as possible, as then the engine will generally throw the animal off, but when slow it will pile under the engine and throw it off. One witness says the grade, going west from the bars to the trestle, is descending, and another that it is ascending; all agree that the train could not have been stopped before it reached the trestle. The engine struck the horses just at the east end of the trestle, and was, with several cars, thrown from the track, and the conductor, Edwin S. Dewey, was killed.

This is, substantially, all the evidence, and in our opinion it is not sufficient to justify a verdict for the plaintiff. The fact that the bars were down or the boards off the fence would not, under our statute, constitute any ground for the plaintiff's recovery in this action; and under the rule recognized and applied in *Aylesworth v. C. R. I. and P. R. R. Co.*, 30 *Iowa*, 459, would not, without proof of knowledge, or means

Dewey v. Chicago, &c. R. Co.

of it, that the fence was out of repair, constitute a ground for the recovery of the value of the horses killed by the same accident.

The only ground for plaintiff's recovery must be that of negligence on the part of defendant's employees ; and here the insuperable difficulty is, that the deceased himself was the superior officer of the train, and directed the very line of conduct which resulted in his death. If this was negligence, it must, of necessity, have been his negligence.

It is argued by appellee's counsel, that the engineer was already making efforts to pass the horses at the time the conductor directed him to do so ; admit this and still it does not help the plaintiff's case, since it was within the power and duty of the deceased to have given his direction in the time and manner to avoid the accident if it were possible. But suppose the accident had resulted differently, so that the engineer had been killed and the conductor survived. In such case, if the line of conduct pursued was negligent or careless, the administrator of the engineer would have had a clear cause of action, since the engineer was acting under the express direction of his superior officer ; and this being so, it must follow that this action cannot be maintained.

Mr. Justice MILLER, now of this bench, and who tried the cause below, unites with the other members of the court in the foregoing opinion, which reverses the judgment of the circuit court. He overruled the appellant's motion there to set aside the verdict because it was not sustained by sufficient evidence ; and his reason, as given at the time, was not that he thought the evidence sufficient, but that a new trial would be as unavailing to the defendant as the one just had ; and as neither party would be content with less than the ultimate adjudication by the supreme court, it might as

Dewey v. Chicago, &c. R. Co.

well be settled under the trial already had, as by its repetition.

We therefore avail ourselves of this occasion to correct what we understand to be a very general misapprehension on the part of district and circuit judges in respect to the rule as to new trials in the *nisi prius* courts. This court has repeatedly declared the rule for itself (and such is the rule in most appellate tribunals), that where the evidence is conflicting and the *nisi prius* court has overruled a motion for a new trial, grounded upon the insufficiency of the evidence, we will not interfere. And this because, first, the jury have found the verdict and given credit to the witnesses on the one side of the conflict; second, the judge, who also heard the testimony from the mouths of the witnesses, and weighed the same in the balance of his more cultured and accurate legal judgment, has, by overruling the motion, given his approval and indorsement to the verdict; and third, this court can never have the benefit of observing the conduct and deportment of the witnesses while testifying, nor even the peculiarity of their expressions, but generally only the substance of their testimony, and often in the language of the attorneys interested in the cause. A mention of these considerations upon which the rule for the appellate courts is (in part) founded, is sufficient to show that the rule ought not and does not have any application whatever to the *nisi prius* courts. Those courts ought to independently exercise their power to grant new trials, and, with entire freedom from the rule which controls appellate tribunals, they ought to grant new trials whenever their superior and more comprehensive judgment teaches them that the verdict of the jury fails to administer substantial justice to the parties in the case. Whenever it appears that the jury have, from any cause, failed to respond truly to the real merits of the controversy, they have failed to do their duty, and the

Illinois Central R. R. Co. v. Phillips.

verdict ought to be set aside and a new trial granted. But while the greatest freedom on the part of *nisi prius* judges should be exercised in setting aside verdicts, in order to secure and effectuate justice, yet judges ought to use caution in the exercise of the power so as not to invade the legitimate province of the jury when they have manifested a fair and intelligent consideration of the evidence submitted to them, nor to injuriously protract litigation in pursuit of invariable and absolute justice in every case, for this cannot be attained.

We have been led to these suggestions by reason of intimations from some of the district and circuit judges that they applied the rule of the supreme court in deciding motions for new trials before them; and also from a conviction we have that those judges often manifest an undue delicacy and restraint in the exercise of their power to grant new trials.

The judgment of the circuit court in this case is reversed.

BY THE COURT.—Judgment reversed.

THE ILLINOIS CENTRAL RAILROAD COMPANY v. PHILLIPS.

55 *Illinois*, 194.

Supreme Court of Illinois; September Term, 1870.

Negligence. Evidence. In an action against a railroad company to recover damages for injuries sustained by the plaintiff while in the defendant's station, from an explosion of the boiler of a locomotive.

Illinois Central R. R. Co. v. Phillips.

tive of the defendant, the mere fact of such explosion is not conclusive evidence of negligence on the part of defendant; it is presumptive evidence only, throwing the burden of disproving negligence upon the defendant.

Where, in such a case, it is shown that the iron used in the construction of the boiler is of the kind usually employed, has been subjected to and resisted the usual tests, and has been used by experienced persons with prudence and skill, this presumption is overcome, and the inference must be that the explosion occurred from some latent defect, not detected by the usual and proper tests.

The case of Illinois Central R. R. Co. v. Phillips, 49 Ill. 284, upon this point, affirmed upon a rehearing.

Carriers. Although railroads owe a higher duty to their passengers than to strangers, the utmost care and skill being required of them, as common carriers, towards their passengers, they also owe to strangers such diligence as would be exercised by prudent, skillful, and discreet men, having a due regard to the rights and demands of the public, and a proper desire to protect life and property.

Appeal to the supreme court of Illinois from the superior court of the city of Chicago.

This was an action to recover damages for injuries to the plaintiff resulting from the explosion of a boiler of one of the defendant's locomotives while the plaintiff was in one of the stations of the defendant's road for the purpose of purchasing a ticket upon another road, which had its office in the same station. The facts shown by the evidence are stated in the opinion.

Judgment was rendered for the plaintiff; from which the defendant appealed. The judgment was reversed by the supreme court, and the cause remanded for a new trial.

Upon the second trial, the following instruction to the jury was asked by the defendant:

"The mere fact that the boiler of the engine in question exploded, causing injury to the plaintiff, is not, in this case, and under the relations existing at the time between the plaintiff and defendant, as set forth in the declaration, even *prima facie* evidence of negligence,

Illinois Central R. R. Co. v. Phillips.

or want of due and proper care on the part of the defendant, and the jury are not authorized to find the existence of such negligence, or want of due and proper care, from the mere fact of such explosion and injury."

This instruction was refused. A verdict was rendered for the plaintiff, and judgment for him entered accordingly. From this judgment defendant again appealed.

John H. Jewett, and *B. C. Cook*, for the appellant.

The instruction asked for embodied the true rule. *Brand v. Schenectady R. R. Co.*, 8 *Barb. (N. Y.)* 368; in which the case of *Stokes v. Saltonstall*, 13 *Pet.* 161, is cited; *Ang. on Carr.* § 569; *Ware v. Gay*, 11 *Pick.* 106; *State v. Baltimore, &c. R. R. Co.*, 24 *Md.* 84; *Sheldon v. Hudson River R. R. Co.*, 14 *N. Y.* 218; *Burroughs v. Housatonic R. R. Co.*, 15 *Conn.* 124; *Batchelder v. Heagan*, 6 *Shep. (18 Me.)* 32; *Clark v. Foot*, 8 *Johns. (N. Y.)* 421; *Terry v. New York Central R. R. Co.*, 22 *Barb.* 574; *Shaw v. Boston, &c. R. R. Co.*, 8 *Gray*, 45; *Illinois Central R. R. Co. v. Ready*, 17 *Ill.* 580; *Same v. Phelps*, 29 *Id.* 447; *Same v. Goodwin*, 30 *Id.* 117; *Pierce on Am. R. Law*, 314; *Stewart v. Hawley*, 22 *Barb. (N. Y.)* 619; *McCully v. Clark*, 40 *Pa. St.* 407; *Le Barron v. East Boston Ferry Co.*, 11 *Allen*, 315.

Hurd, Booth, & Kreamer, for the appellee.

The rule laid down by this court was the true rule on that subject. *Field v. New York Central R. R. Co.*, 32 *N. Y.* 339; *Hull v. Sacramento Valley R. R. Co.*, 14 *Cal.* 387; *Ellis v. P. & R. R. Co.*, 2 *Ired.* 140; *Herring v. W. & R. R. Co.*, 10 *Id.*; *Piggott v. Eastern Counties R. R. Co.*, 54 *Eng. C. L.* 238.

THORNTON, J.—On December 18, 1867, appellee

Illinois Central R. R. Co. v. Phillips.

was injured by the explosion of a boiler of the railway company, in the Union depot at Chicago. The case was brought to this court in 1868, and reversed and remanded. 49 *Ill.* 234. Since then, a second trial resulted in a judgment against appellants for sixteen thousand dollars, and this appeal is prosecuted for its reversal.

The declaration alleges that the engine was old, worn out, insecure, and wholly unfit for use; and that the company did not, by its servants, exercise due and proper care in its use and management.

The proof does not justify the charge of omission of due care in the management of the engine. In the recital of facts we are, therefore, confined to the condition of the boiler, at the time of the explosion.

The engine and boiler were between thirteen and fourteen years old, and were thoroughly repaired in 1866. The boiler was originally of Low Moor iron, of a scant five-sixteenths grade. In 1866, the upper portion was good. The lower half was renewed by inserting Juniata iron—one of the best American irons for locomotive boilers. The engine and boiler were originally built by Rogers & Co., leading builders in the United States. According to the opinion of all the witnesses, the boiler, after these repairs, was regarded as good as a new one. Everything was done by the servants of the company to make it safe and secure. The corroded iron was removed. The deterioration of the iron which remained could not be perceived.

In this condition, the engine was put upon the road, and run until in October, 1867, when it was brought into the shop for repairs to the machinery—not the boiler, particularly. After some slight repairs, and a careful and thorough examination, it was pronounced safe by competent mechanics. No indications of weakness; no defects, except a small blister on the crown sheet, could be seen. It was then tested by a pressure

Illinois Central R. R. Co. v. Phillips.

of steam of one hundred and forty pounds to the square inch.

John De Laf, foreman of machinery at the Illinois Central round house, testified that, in October, 1867, the boiler was tested by steam pressure, previous to putting on the casing ; that the rule of the shop was, to test with from one hundred and forty to one hundred and fifty pounds of steam ; that he sounded the boiler to discover defects, and found none ; that he examined the iron after the explosion to find any indications of burning or of weakness ; that he found none ; and the rent seemed to be torn out of the solid iron.

John Gillis, a boiler maker, testified to the testing of the boiler in 1867 ; that its condition was, in all particulars, good ; that he examined the iron after the explosion. It was bright, the grain clear, and not the slightest corrosion around the seam ; no indications of burning ; the fire box stood intact, and the crown sheet straight, and if there had been undue heat, arising from deficiency of water, the crown sheet would have expanded, been warped and bent.

The engineer in charge testified, that as he went into the depot, at the time of the explosion, he examined and found there were three solid guages of water, indicating seven or eight inches over the crown sheet.

George Holton, master mechanic in the Illinois Central shops, testified that he examined thoroughly the boiler in October, 1867, that its condition was then good ; saw the engine every day for some time prior to the explosion, and perceived no leaks or defects. After the explosion he examined the iron ; it looked like tough iron ; showed a good fibre ; saw no weakness, and the crown sheet looked as good after the explosion as before.

It is evident from all the testimony that, if the crown sheet is covered with water, there is no danger of an explosion of want from water.

Illinois Central R. R. Co. v. Phillips.

Chalmers, one of the witnesses for appellee, stated that explosions generally take place from low water in the boiler. Burgess, another, said: "I never knew a boiler to explode, unless it was short of water." Another one, Thomas, testified that boilers would explode from other causes than want of water.

The witnesses, however, on both sides, all agree that, in the case of an explosion from want of water, evidences of undue heat would appear in the fragments of iron; the crown sheet would show indications of heat, and would be warped; that the iron would be brittle, and the changes in the grain of a permanent character. The evidence in this case does not show any such indications. It further appears from the evidence of the engineer, uncontradicted, that at the time of the explosion he had only about one hundred pounds of steam. The safety valves and the gauge cock, the tests of the steam pressure, were in reliable condition, both before and after the explosion, and there is no proof that the engineer in charge was incompetent.

This court held in this case, 49 *Ill. supra*, that the mere fact that the boiler exploded was *prima facie* evidence of negligence; and that the burden of disproving the negligence was thrown upon the company. It is further stated, in the opinion of the court, that "where it is shown that the iron used in the construction of such a boiler is of the kind usually employed, has been subjected to and stood the usual tests, and has been used by experienced persons with prudence and skill, this *prima facie* case is overcome, and the inference must be drawn that the explosion occurred from some latent defect, not detected by the usual and proper tests; and of all these questions, the jury must be the judges."

The counsel for appellants question the correctness of this decision, and urge, with unusual earnestness, a

Illinois Central R. R. Co. v. Phillips.

review of it. We have again carefully considered the question and the arguments adduced, and adhere to the former opinion, as to the inference from the explosion.

It is assumed, that if the law infers negligence upon proof of an explosion and injury, the appellants are deprived of any defense except to show that there was no explosion and injury. This is not the effect of the decision. Such a construction makes the explosion, and consequent injury, *conclusive* evidence of negligence, whereas, the decision is, that they are only *prima facie* evidence; that they create merely a disputable presumption, and thus the burden of proof is thrown upon the other party. Such proof does not conclude or forbid further evidence, but only dispenses with it until some proof is given on the other side, to rebut the presumption thus raised.

There is no great hardship imposed upon appellants, in presuming negligence upon proof of the explosion. It may be easily rebutted, if untrue. Such a presumption, however, is prompted by motives of public policy, and is necessary for the promotion of the public safety. We know explosions happen—that they are the exception, not the rule. We know that boilers, manufactured of good material, and carefully managed by skillful and prudent men, carefully tested, thoroughly repaired when defective, and closely observed to discover indications of weakness, rarely explode. There are mysterious explosions, assignable to no known cause. This is only the exclusion of what is comprehended in the general rule, and should not forbid the inference deducible therefrom. No sane man can doubt that explosions generally result from defective iron, corrosion or deterioration of the boiler, or mismanagement. Such facts proved would constitute negligence. Common observation, and the natural operation of the mind, force the conclusion, that this fearful rending of a boiler

into an hundred pieces, is generally caused by the omission of some duty.

The law indulges in numerous presumptions—some conclusive, some disputable. Even in cases affecting liberty and life, inferences unfavorable to the accused are drawn from the mere act of homicide, and the possession of stolen property. It is not true, as supposed in the argument, that this court would reverse a judgment of conviction for murder, which rested on no other evidence than the act of killing. The Criminal Code declares, "the killing being proved, the burden of proving circumstances of mitigation, or that justify or excuse the homicide, will devolve on the accused." It is plainly laid down in all works on criminal law, that on a charge of murder, malice is presumed from the fact of killing, unaccompanied with circumstances of extenuation; and the burden of disproving the malice is thrown upon the accused. The doctrine in York's case,^{9 Met. 93}, is, that where the killing is proved to have been committed by the defendant, and nothing further is shown, the presumption of law is, that it was malicious, and an act of murder. Possession of the fruits of crime, recently after its commission, is *prima facie* evidence of guilty possession.

These presumptions are the result of experience. We know there is a connection between certain things—that one is the effect of the other. Sometimes the connection is so intimate and universal that the presumption is conclusive. But where the relation between the cause and effect is general, and not universal, the law infers one fact from proof of another, in the absence of opposing proof.

It was said in the argument, that the law will not be guilty of so glaring an absurdity as to say, that it will assume that to be true until it is disproved, which is as liable to be false as it is to be true. This is not fair argument. It is not a correct deduction from

Illinois Central R. R. Co. v. Phillips.

the testimony. The evidence shows that a very large proportion of explosions are the result of over-pressure of steam, or defect in workmanship, or defect in material, or some mismanagement. Such is the emphatic testimony of Hayes. He stated that he had examined thirty cases of explosion, and that known causes could be assigned for all of them, except four. The great preponderance of the evidence is, that explosions can generally be traced to known causes. The mysterious explosions constitute the exception. From the general experience and observation of intelligent mechanics, introduced by appellants, we conclude, that the cause of explosions generally, not uniformly, is a want of care, caution, diligence, or discretion. Thus a *prima facie* case is made, subject to be disproved.

Counsel for appellants have cited numerous cases, but they do not sustain the position assumed. Illinois Central R. R. Co. v. Reedy, 17 Ill. 580, was a case to recover damages for killing a steer. The company were not bound to fence their road, to prevent the intrusion of stock. The court decided that animals upon the track, under such circumstances, were trespassers, and that the company were only liable for willful negligence. The train was rightfully on the track; the steer was wrongfully there. Hence, the mere fact of killing was balanced by the previous trespass. To the same effect are the cases of Illinois Central R. R. Co. v. Phelps, 29 Ill. 447, and Same v. Goodwin, 30 Ill. 117. The rule in all these cases is, that it is negligence in the owners of animals to permit them to go on a railroad track, where the company were not bound to fence, and that this could only be overcome by proof of gross negligence, or willful injury. In the case under consideration, appellee was lawfully in the depot, and was guilty of no negligence whatever.

Without referring to all the cases in other States, cited by appellants, we desire to call attention to some

Illinois Central R. R. Co. v. Phillips.

authorities which sustain the view taken by us. This court decided, in *Illinois Central R. R. Co. v. Mills*, 42 Ill. 408, that the escapement of fire from a railroad locomotive affords a presumption that the company did not employ the best known contrivances to prevent such escapement, and that it devolved upon the company to rebut such presumption. In *Piggott v. Eastern Counties R. R. Co.*, 3 Com. B. 229, one of the judges remarked, "that the fact of the buildings being fired by sparks emitted from defendant's engine, established a *prima facie* case of negligence." In the case of *Ellis v. Portsmouth & Roanoke R. R. Co.*, 2 Ired. 138, the court held, "that when the plaintiff shows damage resulting from the defendants' act, which act, with the exercise of proper care, does not ordinarily produce damage, he makes a *prima facie* case of negligence."

In numerous cases, the proof of the accident and injury shows a want of due care, and changes the burden of proof. *Byrne v. Boadle*, 2 H. & C. 722; *Scott v. London Docks Co.*, 3 Id. 596; *Field v. New York Central R. R. Co.*, 32 N. Y. 339; *Hull v. Sacramento Valley R. R. Co.*, 14 Cal. 387.

Railroad corporations employ a powerful and dangerous agency, and public policy and safety require that they should be held to a high degree of care and diligence. Even their liability for injuries to passengers does not depend solely upon contract, but is founded on the great principle of social duty, that every man should so conduct his own affairs as not to injure his neighbor. They are bound to use safe and good machinery, and they ought to know its strength and character. It is a reasonable presumption, that it is defective, or mismanaged, when it is torn into fragments, endangering hundreds of lives.

It is also contended, that a distinction exists between the relative duties of a common carrier to pas-

Illinois Central R. R. Co. v. Phillips.

sengers and to strangers, and that appellants owed no duty to the party injured, in this case. There is no doubt, that a higher degree of care and diligence is required towards the former than the latter. In the former case, the utmost care and skill are required; in the other, only such diligence as would be exercised by prudent, skillful, and discreet men, having a due regard to the rights and demands of the public, and a proper desire to protect life and property. One not sustaining the relation of trust and confidence which exists between carrier and passenger, can not recover, if, by the exercise of care and prudence, he might have avoided the injury. *Galena, &c. R. R. Co. v. Yarwood*, 17 *Ill.* 519; *State v. Baltimore, &c. R. R. Co.*, 24 *Md.* 84.

Though appellee was no passenger, yet he was guilty of no negligence. He was in the depot to purchase a ticket on another road, which had its office there. He had a lawful right to be there. He did not heedlessly rush into danger, but used all the prudence incumbent upon him. For the assumed negligence of the company, and the consequent injury, he is entitled to recover, until the negligence is disproved. Otherwise, the company might injure and destroy, at pleasure, all who were not passengers.

It would extend this opinion to an unreasonable length, if we were to undertake a discussion of all the instructions given and refused, and of all the questions presented in the argument.

Whether negligence is a question of fact, or a mixed question of law and fact, or a conclusion of law from facts proved, it is not necessary to discuss. It is not involved in the case. It is sufficient that we have authority to revise the action of the jury, upon the facts presented, for the promotion of justice, and the protection of the rights of the parties.

The facts in relation to the boiler in question are undisputed. The engineer was skillful and prudent.

Chicago, &c. R. R. Co. v. Stumps.

No omission of duty was proved. There was a sufficiency of water, and no over pressure of steam. The boiler was originally of the best iron, and constructed by competent builders. It had recently, prior to the explosion, been thoroughly repaired, with the best material, and the usual tests were applied, to discover any defects or weakness.

We, therefore, think that the *prima facie* case has been completely disproved.

The judgment is reversed and the cause remanded.

BY THE COURT.—Judgment reversed.

THE CHICAGO, BURLINGTON, & QUINCY RAILROAD COMPANY v. STUMPS.

55 Illinois, 367.

Supreme Court of Illinois ; September Term, 1870.

Negligence. Operating a railroad through city streets. A railroad company is held to the exercise of a very high degree of care and diligence in operating its road through the public streets of a city, but the care and caution in this respect are required to be exercised in reference to the proper uses of the street as a thoroughfare of travel, rather than to the safety of persons in wrongfully getting on their cars when running.

The duty of a railroad company operating its road under such circumstances is to use every reasonable precaution,—not every absolutely necessary precaution,—to avoid injury to individuals.

Jury. Trial. Appeal. The discretion of a jury to judge of the credibility of witnesses is not arbitrary; they must exercise their discretion,—not their will, merely. In this respect the action of a jury may be reviewed by an appellate court.

Appeal to the supreme court of Illinois from the superior court of Chicago.

Chicago, &c. R. R. Co. v. Stamps.

This was an action to recover damages for personal injuries to the plaintiff, a boy aged seven years, from his being run over by the defendant's train. The circumstances appear from the evidence stated in the opinion.

Upon the trial the jury rendered a verdict in favor of the plaintiff. A motion by the defendant for a new trial was denied; and judgment entered for the plaintiff. The defendant appealed.

Walker, Dexter, & Smith, for the appellants.

Rosenthal & Pence, for the appellee.

SHELDON, J.—This was an action on the case, brought by the appellee, a boy of about the age of seven years, for the recovery of damages for personal injuries sustained by him upon the track of the appellants, upon Brown street, in the city of Chicago, on April 17, 1869.

It appears from the testimony that the train of the appellants started from Center avenue, with some thirteen cars, to take them to the docks of the company, on Twenty-second street, to load with lumber, with the cars ahead of the engine, that is, the engine was pushing the train, and after they turned the curve at Brown street, and when near and a few feet north of its intersection with Walsh street, the appellee was run over, and both of his legs were crushed below the knee. At the time the accident occurred, the appellee, together with Henry Mous, a lad of about twelve years of age, and Herman Mous, nine years of age, were going to the planing mill, on Twenty-second street, for shavings, and had with them bags, and when upon Brown street, and just north of its intersection with Walsh street, the appellee was, in some manner, thrown under the train, and received the injuries complained of.

There is some conflict in the testimony, as to wheth-

Chicago, &c. R. R. Co. v. Stumps.

er the appellee, at the time, was attempting to climb upon the ladder of a detached car standing upon the track ahead of the approaching train, or whether he was attempting to climb upon the ladder of one of the cars of the train in motion.

The only testimony of the appellee on this point, is that of Henry Mous, one of the boys who was with the appellee at the time of the accident, who says :

There was a single car on the track, and Ferdinand put his bag on the steps of the car. The steps were iron, and go up the corner of the car. The train knocked against the car, and he let go. A fireman hit him on the leg with a piece of coal, and he rolled under the car ; is certain there was a car standing there on the track by itself ; that he put his bag on the car and stood on the steps, but did not get on to the ladder of the car ; that he saw the cars coming three blocks north, just after the appellee put his bag on the steps of the car ; that when the train struck the car the appellee walked along and tried to take off the bag, but the engineer threw a stone and hit him, and he let go the bag, and there were some stones there, and he rolled under the wheels ; that he was run over after the car was struck by the first car in the train ; that the appellee was on the north end of the car that stood still ; that the car upon which appellee was climbing, was not attached to the balance of the train, and was empty ; that at the time the train struck the car he was about ten steps from the appellee, upon the street.

In opposition to this, we have, on the part of the appellants, the testimony of the following four witnesses :

John H. Quirk says : " I am a switchman ; remember the accident ; the train was going south, with the engine upon the north end of it, pushing it. I stood on the head car, on the south car of the train, watching to see that all was right, ahead of the train. There were no cars on the track after we turned the curve and

Chicago, &c. R. R. Co. v. Stumpa.

entered Brown street, down to the switch below. I looked ahead as we turned the curve, to see what was on the track, because I wanted to go upon the switch; struck no car on Brown street, up to where we stopped. There was no car ahead of the one I was on; saw no boy there; there was none on the track ahead of this train; there may have been some alongside of the track. From the curve up to where we stopped, I was watching ahead. There was no detached car ahead upon the track; it was the main track, and no place to leave cars; there are never any left there. I know there was no car ahead of this train on Brown street, and we struck no car from the time we left Centre avenue till we got down to the dock. The cars of the train were all coupled together, and to the engine and tender, and I stood on the south car, which was the head car of the train."

Jacob K. Groff, the fireman, says: He remembers the accident; that as they went around the curve at Brown street the engineer shut off, and reversed his engine, and he went out and put tallow upon the valves, and came back and stepped to the side of the engine, and looked out and saw a little boy hanging upon the ladder of the car, and saw him break his hold and fall under the car; that he immediately told the engineer, who reversed his engine and checked the train as soon as possible; that the boy was on the third car from the engine, on the ladder, on the west side of the car, and on the north end of it; that he broke his hold and fell under the car; that there were thirteen cars in the train; that he went out to put tallow on the valves, went out on his side of the engine, crossed over on the running board, and came around to put tallow on the engineer's side; that when he got back he put his tallow pot away and stepped upon the west side of the engine and looked ahead, and saw this boy hanging upon the third car from the engine, upon the ladder.

Chicago, &c. R. R. Co. v. Stumps.

After he broke his hold and fell down off the ladder of the car, there were two wheels passed over him. Witness looked out just in time to see the boy hanging on the lower round of the third car. He had his feet in the steps under the bottom of the car, because he was not tall enough to reach the second one. They did not strike any car or other object after they started from Center avenue, until they stopped; if they had they would have felt it on the engine.

Charles Williams, the bell boy, says: "I did not see the boy on the train before it stopped, for I was on the opposite side of the engine; did not notice the train strike any object after we left the curve; I could have told if it had struck the car or other object; it would have stopped her a little—jerked her. It did not strike any object after it left the curve."

Charles Lake, the engineer, says: "We started from Center avenue, where we got twelve or thirteen cars, and as we went around the curve I shut off, and the fireman went out and oiled the valves; I was going slow; two or three boys tried to get on the train and ride. There was a switchman on the head of the train and on the back next to the engine, to give me signals. The switch was wrong and we had to stop and turn it, to go into Twenty-second street. I was watching the switchman, and did not see the boy slip off; first saw him hanging hold of the car a little this side of Luke street, between Luke and Walsh streets; saw him on the car, and saw another run and jump on the car at the same time; did not see him fall; he had hold of the third or fourth car from the engine. The boy was between Luke and Walsh streets when we stopped, right back of the tender. I should have known if the train had run against anything, but it did not; there would have been a severe shock. If it had run against the car with sufficient force to send it ten or fifteen feet, it would have fetched the engine up so that a man

Chicago, &c. R. R. Co. v. Stumps.

would have felt it. I saw the track ahead when I came round the curve ; and I looked ahead and could see nothing on the track to the dock, the end of the track. Running an engine at the rate of three miles an hour, with a train of thirteen cars, and striking a car standing upon the track, would produce an effect ; it would not be a great effect, but one that you could feel on the engine. I was looking out on the west side of the engine ; my head was out of the side window ; saw the boy playing and jumping on the cars ; had seen boys jump on the train every day ; tried to keep them off, but could not ; they started to jump on this side of Luke street, one block from Walsh street, and continued to jump on till the fireman told me something had happened ; had my head out of the window all the time till after the accident happened, and there was nothing on the track ahead ; was running three or four miles an hour at the time the accident occurred, very slow, because the switch was wrong, and we wanted the switchman to go ahead and turn it so we could go into Twenty-second street lumber yard."

The claim of the plaintiff is, that the servants of this company were guilty of gross negligence, in that they did not see a car standing upon its track ahead of the train, and that they ran against it with force, without coming to an entire halt. But, according to the above testimony of the appellant's witness, there was no car standing upon the track ahead of the train, and it did not run against any car.

It is improbable that there was a car standing upon the track at that point, as there was but one track, and no side switches or turn outs any where near there, and there was no occasion for leaving a car in that situation at that point, and there are never any left there, according to the testimony.

Besides, Henry Mous locates the stationary car about twenty steps north of Walsh street, and then

Chicago, &c. R. R. Co. v. Stumpa.

says that the train went up to Walsh street after it struck the car, and stopped right at Walsh street, the south end of it, and that the detached car, after it was struck by the train, went about five feet beyond Walsh street. This would carry the train forward, after it struck the car, about three car lengths, which was about the distance the train moved after the engineer reversed his engine, according to the testimony of the appellants' witnesses; and when the train stopped, all the witnesses agree that it left the appellee opposite the tender attached to the rear of the engine, where he lay at the time the train stopped.

Had the supposed car stood, and the boy been injured about twenty steps north of Walsh street, it would be necessary to move the train forward the distance of the length of thirteen cars, in order to have placed it in the situation it was, with reference to the appellee, at the time the train stopped. This would have carried the end of the train some four hundred feet south of Walsh street, and beyond the street next south of it. The whole testimony is irreconcilable with the statement, that the appellee was attempting to get upon a detached car standing ahead of the train at the time he received the injuries, but it is entirely consistent with the fact that at that time he was attempting to climb upon the third car ahead of the locomotive, in the moving train.

The plaintiff's testimony upon that point was quite of an unreliable character. The witness swears first, that the fireman threw a piece of coal and hit the plaintiff; then again, he says that the engineer threw a stone, which struck the plaintiff. He is not only contradicted in this respect by both the fireman and engineer, but the engineer says the train was about two blocks long; it was composed of twelve or thirteen cars, twenty-five or thirty feet long. The improbability of the performance of such a feat, of throwing an object that distance

Chicago, &c. R. R. Co. v. Stumps.

and hitting the plaintiff, detracts much from the credibility of the witness.

We can come to no other conclusion, from the whole testimony, than that the appellee, at the time of his injury, was attempting to climb upon the ladder of one of the cars of the train in motion, and not of a detached car standing upon the track ahead of the approaching train, and that the railway company are not chargeable with any negligence in running against such a car.

Nor can we perceive, from the testimony, that the servants of the railway company, in any other respect, or the company itself, were guilty of culpable negligence in the management of the train. As to the ringing of the bell, it is true, the witness, Henry Mous, testifies that it was not rung, but the witness, Williams, whose express and sole employment on the train was to ring the bell, testifies that he rang it continuously from the time of leaving Center avenue to the occurrence of the accident. The engineer and fireman both testify positively to the same. Positive evidence as to that fact is entitled to more weight than negative evidence in relation to it. *C. & R. I. R. R. Co. v. Sill*, 19 *Ill.* 500; *C. & A. R. R. Co. v. Gretzner*, 46 *Id.* 75.

The train was running very slowly, about four miles an hour, it would seem. There were three men on the look out,—Quirk on the head car, the man "Bob" on the rear car, and the engineer. Quirk stood on the head car of the train while passing down Brown street, for the purpose of watching ahead, to guard against accident; the man "Bob" stood on the rear car, next to the locomotive, to repeat any signal that might be made by Quirk to the engineer, and the men appear to have all been attending to their duty in this respect at the time the accident occurred.

If these facts do not show proper care and caution in the management of this train, it is hard to see what more could have been done, except placing a guard

Chicago, &c. R. R. Co. v. Stumps.

upon every car, to keep persons off. And the argument for the appellee seems to go the length of assuming that position—that it was the duty of the company to have employed such a guard; that it should have exercised every precaution within its power to have prevented this particular accident.

The appellant is not responsible for causing this accident merely, but only for negligence in causing it; and negligence is the omission of the means reasonably necessary, not absolutely necessary, to avoid injury to others.

It is true that a railroad company is held to the exercise of a very high degree of care and diligence in operating its road through the public streets of a city, but the care and caution in this respect are required to be exercised in reference to the proper uses of the street as a thoroughfare of travel, rather than to the safety of persons in wrongfully getting on their cars when running.

When an accident has once occurred, because it is seen, after the event, that the use of a particular precaution would have effectually prevented it, that does not show that it was the duty of the appellant, beforehand, to have adopted that precaution. The duty was to have used every reasonable precaution, and not every absolutely necessary precaution, to avoid injury to individuals.

The question is, rather, what would have been the course of a very prudent person, prior to the accident; whether he would have thought exposure to injury from such a cause, such a probable source of danger as to have required the adoption of any further precautions and safeguards than those used, to protect against it. *Chicago v. Starr*, 42 Ill. 174; *C. & A. R. Co. v. McLaughlin*, 47 *Id.* 265.

The decision of this case, it is true, involves the question of the credibility of witnesses, and the jury

Davis v. New York Central, &c R. R. Co.

are peculiarly the judges of that question ; still they have not an arbitrary discretion in this respect.

This court has said that a jury cannot willfully, nor from mere caprice, disregard the testimony of an unimpeached witness ; that while they may judge of the credibility of a witness, they must exercise their judgment while doing so, and not their will, merely. *Robertson v. Dodge*, 28 *Ill.* 161 ; *C. & A. R. R. Co. v. Gretzner (supra)*.

The great preponderance of the testimony is in favor of the defendants, and we are of opinion the jury decided manifestly against the weight of evidence, in finding the defendants guilty of negligence, and the court should have set aside the verdict, on the motion of the defendants.

The judgment must be reversed and the cause remanded.

BY THE COURT.—Judgment reversed.

DAVIS v. THE NEW YORK CENTRAL &
HUDSON RIVER RAILROAD COMPANY.

47 *New York*, 400.

Court of Appeals of New York ; January Term, 1872.

Injury to traveler on highway at crossing. Contributive negligence.

If a traveler upon the highway, on nearing a railway crossing, can, by vigilant use of his eyes and ears, ascertain whether a train is approaching, in time to avoid a collision, the omission to do so is, if a collision occur, negligence contributing to such collision, and will bar a recovery for an injury thereby caused to him, even though the railroad company may also have been guilty of negligence.

Davis v. New York Central, &c. R. R. Co.

But the traveler is not required to stop, or, if riding, to leave his vehicle and go to the track, or to stand up, in order to look and listen for an approaching train.

Appeal to the court of appeals of New York from the general term of the supreme court in the fourth judicial department.

This was an action by executors for damages for causing the death of the testator, by a collision with the defendant's train at a highway crossing. The facts of the case appear from the evidence stated in the opinion.

At the close of the evidence, the defendant moved for a nonsuit, on the ground that the negligence of the deceased contributed to his death. The motion was granted, and the plaintiffs excepted. The exceptions were ordered to be heard at the general term.

Upon the hearing at general term, a new trial was granted. From this order the defendant appealed to the court of appeals, giving the usual stipulation that judgment should be rendered for the plaintiff if the order appealed from should be affirmed.

A. P. Laning, for appellant.

J. H. Martindale, for respondents.

GROVER, J.—To entitle the plaintiffs to go to the jury, the evidence must have been such as to make the questions, whether the injury received by their testator was the result of the negligence of the defendant, and whether he was free from any negligence contributing thereto, proper for their determination. No question is made by the counsel for the appellant but that the first was such. The point made relates to the second. Upon this the difference between the counsel is not as to the law respecting the degree of care

Davis v. New York Central, &c. R. R. Co.

incumbent upon the testator to protect himself from injury in crossing the defendant's track, but in its application to the testimony given in the case. The law required of the testator the exercise of such a degree of care as prudent persons, knowing the danger to be encountered, and attentive to their safety, would take to shield themselves from injury therefrom. It is settled that this requires a vigilant use of the eyes in looking, and of the ears in listening, upon approaching a high-way crossing, to ascertain whether there is a train approaching, and that if by the vigilant use of these faculties, while approaching the crossing, the vicinity of such a train may be discovered by the traveler in time to avoid a collision therewith, the omission so to exercise them, and thus avoid an injury, is such negligence as will bar a recovery therefor, although the railroad company may have been guilty of negligence contributing thereto. It is likewise settled that, if the evidence is such that it would be the duty of the court to set aside a verdict finding the traveler free from negligence, as against evidence, it is error to deny a motion for a nonsuit. The present case requires a further remark. The law requires of the traveler the exercise of this care while approaching the crossing. It does not require him to stop for the purpose of listening. If with a team, it does not require that he should get out of the vehicle in which he is riding, leave his team, and go to the track for the purpose of looking, or to rise up in his vehicle and go upon the track in a standing position, to enable him to obtain a better view of the track. This would be requiring extraordinary care, such as is rarely, if ever, exercised by the most prudent. In applying the law to the present case, the inquiry is whether a verdict finding that the testator could not, by this use of his eyes and ears, while approaching the crossing, have discovered the train, by a collision with which he was killed, in time to have

Davis v. New York Central R. R. Co.

avoided it, should have been set aside by the court as against the evidence. If it should, the nonsuit was right, and the order of the general term setting it aside should be reversed ; but, if not, the order of that court was right, and should be affirmed.

An examination of the case shows that the testator approached the crossing upon a road crossing the track at an angle of forty-five degrees, with a slight wind blowing from him toward the approaching cars ; that the train approached the crossing from the east, running through a cut. The testimony shows that these and some other circumstances prevented the hearing of the noise made by the train, and rendered it highly probable that the testator, if attentive and listening for the sound, could not have heard it while riding in his wagon, which he was driving upon a slow trot or walk, until he got upon or so near the track as to prevent him from extricating himself from the danger. Against this there was nothing in conflict except the fact that the noise made by a train while running at the rate of speed of the one in question, can usually be heard at considerable distance. The injury occurred in August. The plaintiff introduced witnesses who testified that at this time the view of the track, upon which the train was approaching the crossing, was obscured from the road upon which the plaintiff's testator was approaching, by corn growing upon the land adjacent to the road, the foliage in an orchard, rank weeds upon the banks of the land of the defendant, in addition to the fences, the cutting for the track, and the hilly surface in the vicinity of the crossing ; and that, in fact, a train could not be seen by one approaching the crossing, as the testator did, until his horses were nearly upon the track. In answer to this, the defendant proved, by a large number of witnesses, that in February they went there and examined for the purpose of determining how far a train could be seen by

Davis v. New York Central R. R. Co.

a person approaching the crossing sitting in a wagon ; and that when the person so sitting was about thirty feet from the crossing, he could see the train eight or nine rods from the crossing ; and that the distance at which it could so be seen, rapidly increased upon going nearer to the railroad track. At this time there was no growing corn, foliage, or weeds growing there to obscure the view ; consequently, this testimony did not establish that a train could be so seen in August, while such obstruction to the view existed. It did not show that in August the testator could, by looking, have seen the train in time to have avoided the collision. It could not, therefore, be held as a question of law that his failure sooner to discover the train was the result of his inattention to the danger of his situation, or of his failure to use his senses to guard against it. These questions upon the evidence should have been submitted to the jury. There was no pretense of any negligence of the testator after his discovery of the train. It was so near, and running at such speed, that the collision occurred almost immediately thereafter.

The order of the general term directing a new trial must be affirmed, and judgment given for the plaintiff upon the stipulation.

All concur.

BY THE COURT.—Judgment affirmed.

Allyn v. Boston, &c. R. R. Co.

**ALLYN v. THE BOSTON & ALBANY RAIL-
ROAD COMPANY.**

105 *Massachusetts*, 77.

*Supreme Court of Massachusetts; September Term,
1870.*

Injury to traveler on highway at crossing. Contributive negligence.

In an action against a railway company to recover damages for injuries to the plaintiff from a collision with defendant's train at a point where the railroad crossed a highway, the evidence showed that the plaintiff was being driven in an open wagon in the day time along the highway, and that the track and the usual sign at such crossings were visible a distance of five rods in the direction from which he came. The plaintiff testified that he did not know of the crossing, and did not look to see if a train was approaching; that the driver was driving carefully, and his horse was very reliable. *Held*, that there was no evidence that the plaintiff was exercising due care; and the burden of proof being upon him to show due care on his own part as well as negligence by the defendant, the jury should have been instructed to find for the defendant.

Appeal to the supreme court of Massachusetts.

This was an action of tort for personal injuries to the plaintiff, occasioned by the defendant's train striking the wagon in which he was being driven, at the intersection of defendant's railroad and the public highway.

The evidence given upon the trial is stated in the opinion. The defendant requested the court to instruct the jury that the plaintiff could not recover, which was refused. The jury found a verdict for the plaintiff; and the defendant excepted.

Allyn v. Boston, &c. R. R. Co.

N. A. Leonard, and *G. Wells*, for the defendant.

G. M. Stearns, *W. B. C. Pearsons*, and *M. P. Knowlton*, for the plaintiff.

MORTON, J.—The rules of law which must govern this case are well settled. The plaintiff is required to prove not only that the defendants were negligent, but also that his own negligence did not in any degree contribute to his injury. The burden is upon him to show affirmatively that he was in the exercise of due care. *Warren v. Fitchburg R. R. Co.*, 8 *Allen*, 227; *Hickey v. Boston, &c. R. R. Co.*, 14 *Id.* 429; *Murphy v. Deane*, 101 *Mass.* 455. The question of due care is generally for the jury to determine; but where the uncontroverted facts in a case show negligence on the part of the plaintiff, or where there is no evidence to show that he used due care, it is the duty of the court to instruct the jury to return a verdict for the defendant. *Todd v. Old Colony, &c. R. R. Co.*, 7 *Allen*, 207; *Butterfield v. Western R. R. Co.*, 10 *Id.* 532.

Applying these principles to the case at bar, we are of opinion that the plaintiff failed to sustain the burden of showing that he was in the exercise of due care at the time of his injury. It appears that the plaintiff and a companion, one Haskell, were riding together, in the daytime, in an open wagon, at the time of the accident. The highway over which they had driven runs, for a mile or more, nearly parallel with the railroad, which for most of the distance is plainly visible from it. As the crossing is approached, the highway bends a little, and, in order to cross the railroad, rises four and a half feet. This ascent commences twenty feet from the railroad track, and the track and the usual sign over the highway are visible for five rods or more before the railroad is reached. According to the plaintiff's testimony, at the foot of this ascent he could look up the

Allyn v. Boston, &c. R. R. Co.

railroad track towards the west (the direction from which the train which caused the injury came), and there is nothing to intercept the view. He further testified, that as they approached the rise their horse was going at a moderate trot, and when they ascended the rise he walked ; that " I did not see where we were until the horse had got on to the track ; I did not look up." There is no evidence in the case that his companion looked to see if a train was approaching. The single statement of the plaintiff, that " Mr. Haskell was driving carefully, and his horse was very reliable," may show that he was using due care in the management of his horse, but does not fairly tend to show that he looked up the railroad track.

A railroad crossing is a place of danger, and common prudence requires that a traveler on the highway, as he approaches one, should use the precaution of looking to see if a train is approaching. If he fails to do so, the general knowledge and experience of men at once condemn his conduct as careless. *Gaynor v. Old Colony, &c. R. Co.*, 100 *Mass.* 208 ; *Baxter v. Troy, &c. R. R. Co.*, 41 *N. Y.* 502. In the case at bar there is not a scintilla of evidence that either of the parties used this reasonable precaution ; and the case falls within the principle of *Butterfield v. Western R. Co.*, 10 *Allen*, 532. There is nothing in the evidence to show any excuse for the neglect to ascertain whether a train was approaching. The fact that the plaintiff did not know that there was a railroad there is no admissible excuse, because it is obvious that any man who had his sight and used it must have seen that he was approaching a railroad crossing. If the plaintiff did not see it, it shows conclusively that he was not using the circumspection and care which every prudent man does and is required to use in traveling. It is absurd to suppose that a traveler using ordinary care could, in

Wheelock v. Boston, &c. R. R. Co.

the daytime, and with nothing to interfere with his vision, get upon this railroad crossing without seeing it.

The fact that the plaintiff was riding with Haskell, who was driving, does not aid his case. If the plaintiff failed to use the care which prudence required, relying upon the vigilance of his companion, he must prove that Haskell was in the exercise of due care, not only in the management of his horse, but in using the necessary precautions to guard against danger from passing trains. *Commonwealth v. Fitchburg R. R. Co.*, 10 *Allen*, 189; *Thoroughgood v. Bryan*, 8 *C. B.* 115.

Upon the whole, we are of opinion that there was no evidence in this case from which the jury could reasonably and properly conclude that the plaintiff was in the exercise of due care, and that the jury should have been instructed, as requested by the defendant, that the plaintiff could not recover.

COLT, J., did not sit.

BY THE COURT.—Exceptions sustained.

WHEELOCK v. THE BOSTON & ALBANY RAIL-
ROAD COMPANY.

105 *Massachusetts*, 203.

Supreme Court of Massachusetts; October Term, 1870.

Injury to traveler at station. Contributive negligence. In an action against a railway company to recover damages for injuries to the plaintiff from being struck by defendant's train at its station, the evidence showed that the plaintiff was at the time crossing the south track of the railway to take a train about to start, standing

Wheelock v. Boston, &c. R. R. Co.

on the north track, when he was struck by another train going eastward on the south track at an unusual time and speed, and giving no warning of its approach. It was usual for passengers to cross the track in the same manner as plaintiff, and several were in fact crossing it at that time. Although there was no evidence that the plaintiff looked westward to see if a train was approaching, it appeared that while walking the first twenty feet of the distance of forty feet across the platform to the track he was looking westward to see another person, and the track was within his view, but he neither saw nor heard the train by which he was injured. *Held*, that the circumstances might amount to an implied invitation on the part of the defendant to the plaintiff to cross the track, and furnished some reason for not using the degree of care requisite where one's safety depends wholly on his own watchfulness; and the question whether the plaintiff exercised due care should be submitted to the jury.

Appeal to the supreme court of Massachusetts.

This was an action of tort for personal injuries to the plaintiff, occasioned by the defendant's train striking him while crossing the track to take another train on the next track.

Upon the trial, the defendant requested the court to instruct the jury that the plaintiff could not recover, there being no evidence of due care on his part. The court directed a *pro forma* verdict for defendant; and reported the case for the opinion of the full bench, as follows:

"On September 17, 1869, the plaintiff attempted to cross the south track of defendant's railroad from the platform of their passenger-house at Ashland, in order to take passage on a train of their cars standing upon the north track, to go to Grafton. The plaintiff resided in Grafton; was engaged in business at Framingham; was in the habit of going from Grafton to Framingham by one of the morning trains, and returning to Grafton in the afternoon by the train on which he attempted to take passage, and for that purpose had provided himself with a commutation ticket which entitled him to

Wheelock v. Boston, &c. R. R. Co.

twenty-six conveyances over the road, between Framingham and Grafton, and which then entitled him to several passages over the road. On the afternoon in question, having occasion to transact some business in Ashland, he went there, with another person, in a carriage from Framingham, a distance of about four miles (Ashland being one of the intermediate stations between Framingham and Grafton), passing the station and crossing hereinafter mentioned; and having transacted his business he drove to the station-house at Ashland, crossing the tracks of the railroad at a highway crossing about two hundred feet west of the station-house. Arriving at the station-house which stood upon the south of the tracks, he alighted from his carriage upon the southwest corner of the platform there. As he was crossing the tracks as aforesaid at the highway crossing, the train in which he sought to take passage arrived in front of the station-house; and stopped for the purpose of receiving and discharging passengers, while he was passing from the crossing to the place where he alighted.

“There was an open and traveled place from the highway which crossed the track as aforesaid on the north side of the railroad; and a platform on the north side of the north track; to which platform the plaintiff could have come and taken the train which he desired to take, by passing over said travelled place, without crossing the tracks as aforesaid or going to the south side of the railroad; but the plaintiff said that he did not know at the time that he could so take the train.

“The usual time of stopping was about one minute. Having alighted, the plaintiff made some remark to the person in the carriage, and then proceeded in a straight line down the platform, by the west end of the station-house, to the railroad track, the baggage car of the train being immediately in front of him. When crossing the railroad before arriving at the depot, as aforesaid, he

Wheelock v. Boston, &c. R. R. Co.

had observed a person, whom he thought to be one Wetherby, standing on the south platform about seventy-five feet west of the northwest corner of the station-house; and as he passed from his carriage towards the track, he looked at this person to see if it was Wetherby,—looking in a northwesterly direction, so that his line of vision embraced as much of the railroad track as could be seen from the point where he was. He continued to look at the person while walking about half the distance from the place where he alighted to the railroad track; and then he turned his head to the front, and looked towards the baggage car of the train he was to go on, being attracted by some article that was being removed from the car. While looking in the northwesterly direction at said person, he saw persons standing upon the platform; he also saw a small building used as a flagman's station, and his view of the track was somewhat obstructed by the building and by the persons standing on the platform. He said that he would not say that he saw any part of the railroad track when looking in a northwesterly direction as aforesaid; and he did not state that at any time he looked for the purpose of seeing if a train was or was not coming on the track on which he stepped when he turned his head to the front. He also saw persons passing to and fro between the passenger-house and the train upon which he intended to take passage. Arriving at the edge of the platform, he stepped upon the railroad track, attempting to cross where it was customary for passengers to cross; and in attempting to cross he went a little diagonally across the track toward the train, with his back partially to the west; and having taken one or two steps upon said track, he was struck and seriously injured by the engine of a train approaching from the west, which was twenty minutes behind time, running at an unusual rate of speed without any warning of its approach.

Wheelock v. Boston, &c. R. R. Co.

"There was no plank walk at the place where the plaintiff so stepped on the track. He testified that the track was straight for half a mile towards the west, the direction from which the train that struck him came. The distance from the place on the platform where he alighted from his carriage, to the railroad track where he was struck, was about forty feet, which distance he walked without interruption at an ordinary walking gait; he saw no approaching train, when looking in the northwesterly direction as aforesaid, and he did not again look in that direction before he was struck; he heard no approaching train; he knew that the train by which he was injured was not due at that time, but supposed it had passed about twenty minutes before, Framingham being the usual place of the meeting of these trains; there was no flagman at the crossing when he passed with his carriage a minute or so before, as was usual when trains were expected; he was not warned of the approaching train by any agent or employee of the defendants; there was nothing about his person or dress to prevent his seeing or hearing as well as persons ordinarily can; and he did not expect any train to come on that track at that time.

"Upon the foregoing facts, the defendants asked the judge to direct a verdict in their favor, on the ground that there was no evidence that the plaintiff was in the exercise of due care at the time of the injury. The judge directed a *pro forma* verdict for the defendants; and the case is reported for the opinion of the full court upon that question."

G. F. Verry, for the plaintiff.

G. S. Hale, & F. P. Goulding, for the defendants.

MORTON, J.—In cases of this nature, the burden of proof is upon the plaintiff to show that he was in the

Wheelock v. Boston, &c. R. R. Co.

exercise of due care at the time he was injured. In numerous recent cases it has been held that if the evidence discloses an act of carelessness on the part of the plaintiff, contributing to his injury, or if there is no evidence to show that he used the precautions and vigilance, which, according to common experience, men of ordinary prudence exercise under like circumstances, and there appears no reasonable excuse for his failure to do so, it is the duty of the court to direct a verdict for the defendants. This is upon the ground that the undisputed facts, viewed in the light of the common knowledge and experience of men, of which the court must take notice, show that the plaintiff has failed to prove an essential element of his case, namely, that he was in the exercise of ordinary care. But when the question, whether the plaintiff was using ordinary care, depends upon a variety of circumstances and the inferences to be drawn from them as to the effect which they would have upon the motives and conduct of men of the usual prudence and intelligence, and it cannot be said, as a matter of common knowledge and experience, that the plaintiff was careless, then the law refers the question to the judgment and experience of the jury.

A person cannot be said to be in the exercise of due care who enters upon a railroad track without using reasonable vigilance to ascertain whether a train is approaching. But the degree of care which a prudent man would use depends upon the time and circumstances. Thus, where a person entered upon a railroad track at a highway crossing, without looking to see if a train was approaching, and without any reasonable excuse for not looking, and thereby received an injury, it was held that he was careless, and could not recover. *Butterfield v. Western R. R. Co.*, 10 *Allen*, 532; *Allyn v. Boston, &c. R. R. Co.*, *Ante*, 399. On the other hand, it has been held that when a man attempted to

Wheelock v. Boston, &c. R. R. Co.

cross a railroad track at a station, for the purpose of taking the cars, without looking to see if a train was approaching, but did so upon the invitation and direction of the station agent, it was a question for the jury whether in so doing he was in the exercise of due care. *Warren v. Fitchburg R. R. Co.*, 8 *Allen*, 227.

In the case at bar, there are some circumstances which distinguish it from the class of cases first above cited. There was no evidence that the plaintiff looked up the track for the purpose of seeing if a train was approaching; but he testified that he looked up the platform to see an acquaintance, and that his line of vision embraced the track for a considerable distance in the direction from which the train by which he was injured came. It also appeared that he was there for the purpose of taking the cars; that the passenger train, which he was about to take, stood upon the opposite track, discharging and receiving passengers; and that passengers were passing across the track in both directions, between the cars and the station-house. These circumstances may amount to an implied invitation on the part of the defendant to the plaintiff to cross the track, and an implied assurance that it would be safe to do so. They furnished some reason for not using the degree of care which one would naturally exercise where his safety depended wholly upon his own watchfulness. *Chaffee v. Boston, &c. R. R. Co.*, 104 *Mass.* 108.

Upon a careful consideration of all the evidence, we are of opinion that the question, whether the plaintiff was in the exercise of due care, was one within the province of the jury to decide, and should have been submitted to them under proper instructions.

COLT, J., did not sit.

BY THE COURT.—New trial ordered.

IHL v. THE FORTY-SECOND STREET & GRAND STREET FERRY RAILROAD COMPANY.

47 New York, 817.

Court of Appeals of New York ; January Term, 1872.

Damages. In an action to recover damages for causing the death of a child, aged three years, the absence of proof of special pecuniary damage to the next of kin is not a ground for nonsuiting the plaintiff, or directing the jury to find only nominal damages. *So held*, in an action under the statute of New York, which does not limit the recovery in such cases to the actual pecuniary loss proved.

Negligence. Sending a child little more than three years old across the track of a street railroad, attended only by another child nine and one-half years old, is not necessarily such negligence on the part of its parents as would defeat a recovery in an action brought by the child's administrator against the railroad company for damages for causing its death by negligently running over it while crossing the track.

In such an action the conduct of the child may have an important bearing on the question of the defendant's negligence; but if the latter was clearly negligent, contributory personal negligence on the part of an infant, obviously not *sui juris*, cannot be alleged, unless negligence on the part of his guardian or custodian has brought about the situation, or in some manner contributed to the injury.

Appeal to the court of appeals of New York from the general term of the supreme court in the first judicial department.

This was an action by the administrator of a deceased child for damages to the next of kin from his death, he having been run over and killed on the track of the defendant's road. The action was brought under *N. Y. Laws of 1847*, ch. 450, amended by *N. Y. Laws of 1849*, ch. 256.

Ihl v. Forty-Second Street, &c. R. R. Co.

It appeared that the deceased child was, at the time of his death, three years and two months old. He had been sent by his mother, in charge of another child nine and a half years old, on an errand across the avenue upon which they resided, and through which defendant's road was operated. While crossing the track, the younger child fell and was struck by the horses of one of defendant's cars. The driver of the car was not looking; both wheels of the car passed over the child before it was stopped, and he was killed.

At the close of plaintiff's evidence, the defendant moved for a dismissal of the complaint on the following grounds:

1. That there was no evidence of any pecuniary injury resulting to the next of kin of deceased from his death.

2. That the evidence failed to show that the death of deceased resulted from the wrongful act, neglect, or default of defendant or its servants.

3. That the evidence showed such negligence on the part of the mother of the deceased in sending him in the avenue as proved, and so insufficiently attended as he was shown to have been, as to preclude a recovery in this case.

The motion was denied, and the defendant excepted.

The defendant's counsel asked the court to charge the jury, that to entitle the plaintiff to recover, they must be convinced by the proofs, that the deceased was guilty of no negligence which contributed to the injury, and that the defendant was guilty of such negligence.

The judge declined so to charge; and charged on the first branch of the proposition, that if the jury believed that the parent was not negligent in sending the child out attended as proved, and under the circumstances proved, plaintiff was entitled to a recovery if

Ihl v. Forty-Second Street, &c. R. R. Co.

the jury believed defendant had been negligent in the matter. To this refusal the defendant's counsel excepted.

The defendant's counsel also asked the court to charge, that it was negligence *per se* in the parent to send a child of such tender years unprotected, and unattended, except by another child so young as the attendant in this case, on an errand, to do which, the track of a railroad in constant operation, laid in the public street of the city, must be crossed.

The request was denied, and it was left as a question of fact for the jury to determine whether, under the circumstances of the case, the parent was negligent in sending the deceased into the street. To this refusal defendant's counsel also excepted.

Defendant's counsel also requested the court to charge, that upon the proofs in this case on no account could more than nominal damages be recovered. The court declined so to charge, and defendant's counsel again excepted.

The jury found a verdict for plaintiff, whereupon defendant moved for a new trial on the judge's minutes. The motion was denied, and judgment was subsequently entered upon the verdict. From the judgment the defendant appealed.

Moses Ely, for appellant.

To entitle plaintiff to recover it must appear that deceased was guilty of no negligence. *Deyo v. New York Central R. R. Co.*, 34 *N. Y.* 9; *Gonzales v. New York, &c. R. R. Co.*, 38 *N. Y.* 440; *Owen v. Harlem R. R. Co.*, 35 *N. Y.* 516.

If the attendance of deceased was insufficient, and if it appeared that no accident would have happened had he been properly attended, plaintiff could not recover. *Mangam v. Brooklyn C. R. R. Co.*, 38 *N. Y.* 445; 36 *Barb.* 238; *Pittsburg, &c. R. R. Co. v. Vin-*

Ihl v. Forty-Second Street, &c. R. R. Co.

ing, 27 *Ind.* 513; Honigsburger v. Second Ave. R. R. Co., 33 *How. Pr.* 133; Lehman v. Brooklyn, 29 *Barb.* 234.

The award of damages was excessive. Plaintiff was only entitled to nominal damages. Lehman v. Brooklyn, 29 *Barb.* 234.

U. S. Yard, for respondent.

No proof of pecuniary or special damage was necessary. Oldfield v. New York, &c. R. R. Co., 14 *N. Y.* 310; Tilley v. H. R. R. Co., 29 *N. Y.* 281; Keller v. N. Y. C. R. R., 24 *How.* 172; McIntyre v. N. Y. C. R. R., 37 *N. Y.* 287; O'Mara v. H. R. R., 38 *N. Y.* 445; Murray v. Hudson R. R., 47 *Barb.* 196; Mentz v. Second Ave. R. R., 2 *Robt.* 356.

The sending the child into the street was not negligence *per se*. McMahon v. Mayor, 33 *N. Y.* 647; Ernst v. H. R. R. Co., 35 *N. Y.* 35, 37; Fenn v. B. G. L. Co., 22 *N. Y.* 215.

The whole question of negligence having been submitted to the jury, their verdict will not be disturbed. Mentz v. Third Ave. R. R., *Alb. Law J.*, Feb. 5, 1870. p. 99.

The damages were not excessive. 37 *N. Y.* 287; 38 *N. Y.* 445; 47 *Barb.* 196; 2 *Robt.* 356.

RAPALLO, J.—The absence of proof of special pecuniary damage to the next of kin resulting from the death of the child would not have justified the court in nonsuiting the plaintiff, or in directing the jury to find only nominal damages. It was within the province of the jury, who had before them the parents, their position in life, the occupation of the father, and the age and sex of the child, to form an estimate of the damages with reference to the pecuniary injury, present or prospective, resulting to the next of kin. Except in very rare instances, it would be impracticable to fur-

Ihl v. Forty-Second Street, &c. R. R. Co.

nish direct evidence of any specific loss occasioned by the death of a child of such tender years; and to hold that, without such proof, the plaintiff could not recover, would, in effect, render the statute nugatory in most cases of this description. It cannot be said, as matter of law, that there is no pecuniary damage in such a case, or that the expense of maintaining and educating the child would necessarily exceed any pecuniary advantage which the parents could have derived from his services had he lived. These calculations are for the jury, and any evidence on the subject, beyond the age and sex of the child, the circumstances and condition in life of the parents, or other facts existing at the time of the death or trial, would necessarily be speculative and hypothetical, and would not aid the jury in arriving at a conclusion. It has been held by this court, in several similar cases, that the statute does not limit the recovery to the actual pecuniary loss proved on the trial. *Oldfield v. New York, &c. R. R. Co.*, 14 *N. Y.* 310, 319; *O'Mara v. Hudson River R. R. Co.*, 38 *Id.* 445, 450.

The amount of the damages could have been reviewed in the court below, but cannot here. The only question that can be considered here is, whether any, or more than nominal damages were recoverable.

There was abundant evidence on the question of the defendant's negligence to require the submission of that branch of the case to the jury; and the only remaining question arising on the motion for a nonsuit is, whether the evidence showed such negligence on the part of the mother of the deceased as to preclude a recovery in this action. The alleged negligence of the mother consisted in sending the deceased, aged three years and two months, across the avenue, through which the railroad ran, in charge of his sister, who was of the age of nine and a half years.

It was not established by the evidence that the dis-

Ihl v. Forty-Second Street, &c. R. R. Co.

aster was attributable in any degree to negligence or incompetence on the part of the sister. According to the evidence of several of the witnesses, the deceased fell upon the track at a sufficient distance in front of the car to have enabled her to extricate him had the driver been observant of what was passing and slackened his speed, and there was no request to submit to the jury the question whether the sister was negligent. The defendant relied wholly upon the proposition that the sending of the child across the avenue and track unattended except by another child so young as the attendant in this case was proved to be, was negligence *per se*.

We are of opinion that the refusal so to charge was not error, and that the judge properly left it to the jury to say whether it was negligent "to permit the little daughter between nine and ten years of age to take the little boy to the drug store in the way she started to go." The competency of the little girl to act as attendant of the deceased, was matter of judgment. There is no positive law by which it can be determined. She was not of such an extremely tender age as to place it beyond a doubt that she was incompetent, and therefore it was proper to leave the question to the jury. See *Mangam v. Brooklyn R. R. Co.*, 38 *N. Y.* 455, 459, and *Drew v. Sixth Ave. R. R. Co.*, 26 *Id.* 49, where it was held not as a matter of law negligent in a parent to send a child of the age of eight years to school without an attendant. The third and fourth requests to charge were fully covered by the charge as given, and the refusal of the judge was to charge otherwise than he had already charged. He had fully presented and submitted to the jury the questions of the negligence of the defendant and of the negligence of the parents of the deceased, and the grounds upon which negligence was sought to be imputed to them, and had instructed the jury that if they found either of those questions in

Ihl v. Forty-Second Street, &c. R. R. Co.

favor of the defendant, they must render a verdict for the defendant. A refusal to repeat these instructions was not error.

The first request to charge, viz., that to entitle the plaintiff to recover, the jury must be convinced by the proofs that the deceased was guilty of no negligence which contributed to the injury, and also that the defendant was guilty of such negligence, was properly refused. This request related to the personal conduct of the deceased child. The controversy on the trial was as to the alleged negligence of the parents. If the child exercised proper care, and the injury was caused wholly by the negligence of the driver, the defendant was clearly liable without regard to the question whether it was negligent in the parents to let the child go out as it did. *McMahon v. Mayor*, 33 *N. Y.* 647. In the case supposed, the negligence of the parents, if it existed, would have been too remote to be regarded as contributing to the injury. But if the parents, or the attendant of the child, were guilty of no negligence, and the defendant was, want of care or personal negligence on the part of the child would not, under the circumstances of this case, absolve the defendant from liability. The child was only three years and two months old, and clearly within the adjudged cases in which infants have been held not *sui juris* or responsible for their own conduct, but only through their custodians; and this incapacity was obvious, and apparent to the driver. All the cases in which the negligence of parents or custodians of infants not *sui juris* is held to preclude a recovery by such infants or their representatives, necessarily assume that the conduct of the infant was such as would, in the case of a person *sui juris*, have amounted to contributory negligence, and hold that the negligence of the parent or custodian, but not the personal conduct of the infant, constitutes the bar. The law in such cases makes the infant responsible through

141 v. Forty-Second Street, &c. R. R. Co.

others. *Hartfield v. Roper*, 21 *Wend.* 615, 619. The conduct of the infant may have an important bearing on the question of the defendant's negligence, but when the latter is clearly negligent, contributory personal negligence on the part of an infant obviously not *sui juris* cannot be alleged, unless negligence on the part of his guardian or custodian has brought about the situation, or in some manner contributed to the injury. *Mangam v. Brooklyn R. R. Co.*, 38 *N. Y.* 460, 461.

This element was not embraced in the request, and it would, therefore, have been erroneous to charge it in the form in which it was made.

If the child had been old enough to be regarded as *sui juris*, then his negligence would have been a bar without reference to that of his parents.

The only exception to the charge was to the instruction, that when the driver saw the children, half a block off, his duty was to keep watch of them to prevent running over them. The judge afterwards modified this by stating that it was for the jury to say how far it was the duty of the driver to have kept watch of them, and whether his not doing so was negligence. We do not think the instruction as thus modified erroneous.

Judgment should be affirmed, with costs.

ALLEN, J., did not sit.

Others concur,

BY THE COURT.—Judgment affirmed.

Chicago, &c. R. Co. v. Shultz.

THE CHICAGO & NORTHWESTERN RAIL-
WAY COMPANY v. SHULTZ.

55 Illinois, 421.

Supreme Court of Illinois; September Term, 1870.

Estrays. In an action against a railway company to recover damages for the loss of a colt which had been run over and killed by the defendant's train,—*Held*, that the facts that the colt had been taken up by the plaintiff as an estray, and that, in attempting to comply with the law respecting estrays, the plaintiff had not posted the animal in the mode required by law, did not constitute a defense. Such a case is within the rule that any person in the peaceable possession of property may sue and recover for any wrongful damage it may sustain, against any person but the owner.

Damages. Interest. In an action for damages for an injury to property resulting from the negligence of the defendant, the plaintiff may be allowed interest on the value of the property from the date of the injury.

Appeal to the supreme court of Illinois from the circuit court of Lee county.

This was an action to recover the value of a colt injured by one of defendant's trains. The facts appearing from the evidence are stated in the opinion.

The action was brought before the county judge of Lee county, sitting as a justice of the peace. The plaintiff recovered judgment, and the defendant appealed to the circuit court. Judgment in the circuit court was for the plaintiff; from which the defendant appealed to the supreme court.

Goodwin & Williams, for the appellant.

James K. Edsall, for the appellee.

Chicago, &c. R. Co. v. Shultz.

WALKER, J.—This was an action brought by appellee before the county judge of Lee county, acting as a justice of the peace, against appellant, to recover the value of a colt injured by a passing train. The case was appealed to and tried in the circuit court.

It appears from the evidence that appellee had, about eight months before the colt was injured, taken it up as an estray, and had attempted to post it as such under the law; that he had held it in his possession during that time; that the colt was running in a pasture adjoining the appellant's railroad, and was only separated by a fence, which the company were bound to keep in repair; that the colt got through the fence and upon the road, and was so badly injured by a passing train in the night time, that it became worthless, and was finally killed. In the court below appellee recovered judgment, and the record is brought here on appeal.

On the sufficiency of the fence, the evidence was not entirely harmonious, but the jury have found it was insufficient, and we shall so regard it in considering the case.

It appears the county judge of Lee county, when acting as a justice of the peace, had, under a special act, jurisdiction to a larger sum than the judgment in this case, and no question of jurisdiction is raised on the record.

But it is urged, that appellee had failed to comply with all the requirements of the estray law in posting this animal, and, for that reason, he could not maintain this action. It is conceded, that had he posted the animal as the statute requires, he then could have recovered. It is manifest, that had he omitted no requirement of the estray law, he would thereby become vested with such a right, or lien upon the property, as would have entitled him to its possession against all persons, even the owner, until he should have paid

Chicago, &c. R. Co. v. Shultz.

to him such charges as the law would allow. As a general proposition, subject, it may be, to some exceptions, the person in the peaceable possession of property may sue and recover for any wrongful damage it may sustain, against any person but the true owner, and even against him, if his possession is rightful and coupled with an interest, or he has a qualified property. Appellee being in possession, he, *prima facie*, had the right to recover.

Did, then, the facts, that in posting the required number of notices, a part of them were in an adjoining township, and had failed to have registered the marks, brands, and color of the animal with the town clerk, overcome or rebut his *prima facie* right of recovery? He seems, in good faith, to have attempted to comply with the law, but failed. As far as intention may be considered, he does not occupy the position of a willful wrongdoer. Being in possession under a right derived by taking up the animal as an estray, although he omitted some of the requirements which are prescribed by law, we are aware of no rule of law which will authorize a wrongdoer to question the regularity of the proceeding. It, of course, can not bind the true owner, but must mere strangers and wrongdoers.

We presume that no one would contend, that had an individual intentionally injured the property, or had attempted to appropriate the colt to his use, appellee could not have recovered for either wrong by an appropriate remedy. Appellee is liable to the true owner for the animal, as he failed to post it strictly according to the requirements of the statute. Having constituted himself the bailee of the true owner, he can not repudiate the relation, but must produce the property when called for by the owner. Being so liable, he must be invested with the power to maintain possession or recover damages for injuries against all wrongdoers. Otherwise, he would unintentionally have assumed a

Chicago, &c. R. Co. v. Shultz.

liability to account for the property, when any wrongdoer might injure, destroy, or appropriate it to his own use without liability. Having possession, he was clothed with the *indicia* of ownership, and the company are not at liberty to inquire whether or not his title is defective. The company can not escape liability by showing that his title was defective. They have committed a wrong, and must render compensation. If the company can not question appellee's title, it being *prima facie* legal, if again sued by the true owner, they could plead this recovery in bar. It was the duty of the owner to prevent his animal from straying away, and remaining so long in the possession of appellee, and being in such default, he must look alone to appellee for compensation for the loss he has sustained by the destruction of this animal.

The case of the Peoria, Pekin & Jacksonville R. R. Co. v. McIntyre, 39 Ill. 298, is referred to by appellants as an authority against maintaining this action. From the facts of that case, it does not appear that the regular prescribed steps of the statute had, or had not, been complied with by the plaintiff. It only appears that the animal was an estray, and had been posted. In that case, plaintiff was considered and treated as a bailee, and permitted to recover. We do not see that this case is aided by that, as the question raised in this was not raised or discussed. That case only decides, that a person who has taken up and posted an estray is a bailee, and may recover when it is wrongfully killed by the employees of a railroad company. It does not hold that a person who has been in the undisputed possession of such property for months, and who has unsuccessfully attempted to comply with the estray law, can not recover for a like injury.

In this case, it is objected, that the court erred by instructing the jury, that they were at liberty to allow interest from the time the colt was killed, in case they

Michigan Central R. R. Co. v. Gougar.

found for the plaintiff. In the case of *Bradley v. Geiselman*, 22 Ill. 494, it was held that interest might be recovered in an action of trespass to personal property, from the date of the taking. The object in allowing a recovery for injuries sustained is, that the party wronged may be compensated for the loss; and to allow interest from the date of the injury, on the value of the property, would only give appellee compensation. He has been deprived of the property, and its use, and he has not had the money or its use since that time. But in this case, the evidence largely preponderates in favor of the value of the property being fully equal to the amount of the verdict. What we have already said renders it unnecessary to comment on the instructions asked by appellants, and refused by the court.

The judgment of the circuit court is affirmed.

BY THE COURT.—Judgment affirmed.

THE MICHIGAN CENTRAL RAILROAD COMPANY v. GOUGAR.

55 Illinois, 503.

Supreme Court of Illinois; September Term, 1870.

Evidence. In an action against a railway company to recover damages for injuries to the plaintiff's cattle, run over by a locomotive on the defendant's road, declarations by the engineer in charge of the locomotive, made subsequent to the time of the accident, at a distant place, and when he was not engaged in any business of the defendant's, are not admissible as evidence against the company.

Michigan Central R. R. Co. v. Gougar.

Appeal to the supreme court of Illinois from the circuit court of Will county.

This was an action to recover damages from the defendant for killing cattle belonging to the plaintiff by running a train over them upon the defendant's road. The facts in the case and the history of the action are stated in the opinion.

G. D. A. Parks, for the appellant.

E. C. Fellows, for the appellee.

SOOTY, J.—This was an action originally commenced before a justice of the peace, by the appellee, against the appellant, for killing the stock of the appellee by the locomotive and train of the appellant, on its track, in Will county. The appellee recovered before the justice of the peace, and the appellant removed the case to the circuit court of Will county, where a trial was again had and resulted, as before, in a judgment in favor of the appellee.

The cause now comes to this court on appeal. The errors assigned, on which the appellant relies, to reverse this judgment, are as follows, viz:

1. That the verdict is manifestly against the evidence in the case.
2. That the court erred in admitting improper evidence on the part of the plaintiff.
3. That the court erred in refusing proper instructions asked by the defendant.

We think that the second error is well assigned, and that the court ruled erroneously, in permitting certain evidence to go to the jury, over the objections of the counsel for the appellant.

On the trial in the circuit court, the appellee, who offered himself as a witness for that purpose, was per-

Michigan Central R. R. Co. v. Gougar.

mitted, against the objection of the counsel for the appellant, to testify to a conversation between himself and a Mr. Knowlton, who, it is alleged, was an agent of the company for settling claims against the company for stock killed or injured. The appellee there testified, that, in a conversation he had with Mr. Knowlton, he (Knowlton) stated that he had not seen the engineer of the train that killed the cattle, but that if the engineer said it was all right, he would abide by his decision. Appellee further testified that he afterwards saw Chapman, the engineer, and told him what Mr. Knowlton had said,—that he left it to him to say whether he (appellee) should have pay for his cattle, and that Chapman replied that he did not see the cattle until he got right on them, and that he ought have his pay. The court also permitted the witness Abrams to testify to the same conversation with Chapman.

We are not familiar with any principle of law, or rule of evidence, under which this testimony could properly be permitted to go to the jury for their consideration. In any view that we can take of it, the evidence was inadmissible.

If it was intended by the evidence to prove that Mr. Knowlton had submitted the matters in dispute between the parties to the arbitrament and decision of Chapman, the engineer, then the agent exceeded his authority, and the evidence, for that reason, was incompetent. An agent cannot submit the cause of his principal to arbitration without express authority from the principal so to do, and certainly no such authority is shown, or offered to be shown, in this case. The appellee himself testifies that he never agreed to be bound by the decision of Chapman, the engineer, and it would be most inequitable to hold that the appellant would be bound thereby, and not the appellee, in case the decision had been adverse to his interests.

But if it was only intended to give the evidence as

Michigan Central R. R. Co. v. Gougar.

the declaration of the agent of appellant, we still hold that it was inadmissible, under the circumstances. Whatever Chapman knew that was material to the issue between the parties, could only be proved by calling him as a witness. It certainly could not be established by proving his mere declarations.

In *Fairly v. Hastings*, 10 *Ves.* 123, it was held that if any fact, material to the issue of either party, rests in the knowledge of an agent, it is to be proved by his testimony, not by his mere assertion.

To the same effect is the case of *Thallhiener v. Brinkerhoff*, 4 *Wend.* (N. Y.) 396. In that case, the court say that it is not true, when an agency is established, the declarations of an agent are admitted in evidence merely because they are his declarations; they are only evidence when they form a part of the contract entered into by the agent on behalf of the principal, and in that single case they are admissible.

The admissions and declarations of an agent are always admissible as evidence, when his acts and declarations entered into and formed a part of the *res gesta*, and in that case they may be proved as any other affirmative fact in the case.

The case of *Luby v. Hudson River R. R. Co.*, 17 *N. Y.* 131, is exactly in point. The action was for alleged negligence in running a railroad car, drawn by horses, against the plaintiff, injured, in one of the streets of New York city. At the trial the plaintiff called as a witness a policeman, who was present soon after the accident, and arrested the driver. The witness was permitted to testify, over the objection of the counsel for the defendant, to a conversation with the driver of the car, and when asked why he did not stop the car, the driver replied that the brake was out of order. The admission of this evidence was held to be error. The court say, "that the declarations of an agent or servant do not in general bind the principal. To be

Michigan Central R. R. Co. v. Gougar.

admissible, they must be in the nature of original, and not hearsay, evidence. They must be made not only during the continuance of the agency, but in regard to a transaction depending at the very time."

In the case before us, the declarations of the agent sought to be introduced as evidence, were made at a time long subsequent to the happening of the accident complained of, and at a place distant therefrom, and at a time when the agent was not transacting or doing any business of his principal in relation thereto, or any other business of the principal at the time the declarations were made. They were purely the declarations of the engineer, made on his own responsibility, and therefore inadmissible as evidence to bind the company.

If this evidence had been excluded from the jury, as it ought to have been, by the court, the instructions asked by the appellant, the refusal to give which is complained of, could have no application to the case, and therefore it becomes unnecessary for us to inquire whether they state correct principles of law.

Inasmuch as this cause is to be submitted to another jury, it is not, perhaps, proper for us at this time to comment on the weight of the evidence, the sufficiency of which to sustain the verdict is questioned by the first error assigned.

For the error of the court in admitting improper evidence on the part of the plaintiff, this judgment must be reversed and the cause remanded for a new trial.

BY THE COURT.—Judgment reversed.

Southworth v. Old Colony, &c. R. Co.

**SOUTHWORTH v. THE OLD COLONY & NEW-
PORT RAILWAY COMPANY.**

105 *Massachusetts*, 842.

*Supreme Court of Massachusetts ; October Term,
1870.*

Negligence. In an action against a railway company to recover damages for injuries to the plaintiff's horse and wagon by a collision with the defendant's train at a highway crossing, caused by the negligence of defendants, the fact that the horse was frightened and not under the control of any one at the time of the collision, having been left unfastened and run away, is not conclusive of such want of care on the part of the plaintiff as will defeat the action.

Appeal to the supreme court of Massachusetts from the superior court.

This was an action of tort for killing the horse and injuring the wagon of the plaintiffs by a collision with the defendant's train at a highway crossing of the defendant's railroad.

Upon the trial the judge directed a verdict for the defendant. The plaintiff's counsel excepted ; and the case was reported for the determination of the supreme court, as follows :

"Edson S. Hawes, a clerk of the plaintiffs, who were traders, testified that his duty was to deliver goods for his employers, and he was using the team for this purpose on the day of the injury ; that the plaintiffs had owned the horse three or four months ; that he stopped the team at the house of Peter Woodman, in Dorchester, to deliver a parcel, and left the horse standing at the door, unfastened ; that he had been in the house four or five minutes, when his attention was called to the fact that the horse had started ; that he

Southworth v. Old Colony, &c. R. Co.

ran after it, but could not stop it; that he followed it around a corner, and the horse ran down the street, and ran into the defendants' train, which was crossing the road at the moment, and struck against the engine or first passenger car, and was killed, and the wagon injured. He testified that he did not know what started the horse; that he never was accustomed to hitch it when he left it; that it was a good driving horse, and he had used it during three or four months, and had never hitched it, or known it to start before this time; that it was not afraid of cars; that the place where he stopped on the street was from fifty to one hundred rods from the railroad crossing; that when he got out of the house the horse was ten rods from him, but gained on him very rapidly, and when he reached the track was twenty to thirty rods ahead; that the horse was frightened; that one man tried to stop it, but could not; that the flagman, who was stationed at the crossing (there being no gate there), seeing the horse coming, went up to meet the horse, and tried to stop it, and struck it once or twice over the head, neck, and side with his flag, but in trying thus to stop it he only succeeded in turning it off from the middle of the road to and upon the sidewalk, and changing its gait into a trot; and the witness was opinion that, if the flagman had not interfered, the horse would have gone clear of the cars and have crossed the road without striking the cars.

"On this evidence, which was all that the plaintiffs desired to offer on the question of due care on their part at the time of the accident, the judge ruled that as at the time of the accident the horse was frightened, and not under the control of any one, it was not the subject of any care whatever, and therefore the plaintiffs could not recover in this action, whatever negligence they might show on the part of the defendants; and directed a verdict for the defendants; to which

Southworth v. Old Colony, &c. R. Co.

ruling the plaintiffs' counsel excepted, and the case is now reported for the determination of the supreme judicial court."

A. C. Clark, for the plaintiffs.

C. F. Choate, for the defendants.

AMES, J.—According to the well settled rule in cases of this kind, it was necessary for the plaintiffs to prove that on their part there was no negligence, or want of due and reasonable care, directly contributing to the injury, and that it was caused entirely by the want of such care on the part of the defendant. It was assumed by the learned judge at the trial, that the fact that the horse had escaped from his driver, and was running at large and not under the control of any one, was decisive against the plaintiffs' right to recover in this action, whatever negligence they might show on the part of the defendants. This is undoubtedly true in the case of actions against towns or cities, for injuries occasioned by a defect or want of repair in a highway. Under the statute applicable to such cases, it must be made to appear that the defect or want of repair was the sole cause of the injury. The case of *Davis v. Dudley*, 4 *Allen*, 557, upon which the defendants rely, was a case of that kind. In that case, as in this, the horse had escaped from his driver and was running at large, and the court say that in such a state of facts "the plaintiff unavoidably failed to show the exercise of due care, because it was not, and could not have been, at that time exerted," and that the horse "was not the subject of any care whatever" at the moment of injury. The true ground of the decision, however, and the only ground on which it can stand, is, not that the plaintiff was not in the exercise of due care, but that "the blind violence of the animal, acting without guidance or direction," contributed to the injury, and the defect in

Southworth v. Old Colony, &c. R. Co.

the highway was not the sole cause of it. It was not a question of due care on the plaintiff's part, but the true ground of defense was, that, even if without fault or negligence on the plaintiff's part, the horse had escaped or become wholly unmanageable, and that state of things was not produced by a defect in the highway, the town was not responsible, although the defect in the highway was also a cause of the injury. *Fogg v. Nahant*, 98 *Mass.* 578; *Titus v. Northbridge*, 97 *Id.* 258, 265.

It appears to us that the question whether there was a want of due and reasonable care on the part of the plaintiffs, which contributed directly to the accident, should have been submitted to the jury. We cannot say, as matter of law, that to leave the horse unfastened, for the time and under the circumstances described in the report, was necessarily a want of due, reasonable, and ordinary care. It was evidence having a tendency, and perhaps a strong tendency, to prove negligence, but it was at all events for the jury to consider. This they have had no opportunity to do, as the court directed a verdict for the defendants under the mistaken impression that the mere fact that the horse at the time of the accident was not under the control of any one was decisive upon the question of negligence. *Titcomb v. Fitchburg R. R. Co.*, 12 *Allen*, 254.

BY THE COURT.—Verdict set aside and new trial ordered.

Pacific R. R. Co. v. Nash.

THE PACIFIC RAILROAD COMPANY v. NASH.

7 Kansas, 280.

Supreme Court of Kansas ; January Term, 1871

Contributive negligence. In an action against a railway company to recover the value of a horse owned by the plaintiff, run over and killed by the defendant's engine, the fact that the horse was turned loose by the plaintiff upon the open prairie, four or five miles from the defendant's track, is not such conclusive evidence of negligence on the part of the plaintiff as to defeat his recovery.

Evidence. In such an action, testimony as to whether the railway track was fenced at the place where the horse was killed is competent as showing the degree of care necessary.

Error from the supreme court of Kansas to the Leavenworth district court.

This was an action to recover the value of plaintiff's horse, which had been run over and killed by a locomotive upon defendant's railroad.

The action was brought before a justice of the peace, and was appealed to the district court, where there were two additional trials, each resulting in a verdict for the plaintiff. Upon the second trial in the district court, the evidence showed that plaintiff's horse was turned loose upon the prairie, at a distance of between four and five miles from the track of the defendant's road ; that the horse wandered toward and upon the railroad track, and while running along the track was overtaken by the engine and killed ; that at the particular place where the horse was killed, the track of

defendant's road was fenced on both sides. The defendant asked that certain instructions be given to the jury, which the court refused. The charge given does not appear in the record. The jury having been out all day, without agreeing, were permitted to separate at night, at which time, after the usual admonitions, the court further advised the jury as follows: "That it was exceedingly important that the case should be decided in some way, and that probably after sleep and refreshment they would be able to determine on a verdict; that they had better bring their dinners with them in the morning, in case they desired any, for the court would not feel like ordering dinner the next day at the county's expense, if they should fail to agree by that time." The next day the jury came, and, after being sent out to further deliberate, returned a verdict in favor of the plaintiff.

A motion by the defendant for a new trial was overruled, and judgment entered for plaintiff on the verdict. To review the judgment defendant brought this writ of error.

Hurd & Birnie, for plaintiff in error.

Joseph W. Taylor, for defendant in error.

KINGMAN, Ch. J.—This action was brought by the defendant in error to recover the value of a horse alleged to have been killed by the engine of the plaintiff in error. The horse was turned upon the prairie, four or five miles from the railroad, and strayed upon the road and was killed by the engine. It is not necessary to review the testimony. No good purpose can be served thereby; for while the verdict is one that does not commend itself to our judgment from the testimony, as it appears on the record, still there is testimony tending to uphold every proposition on which the plaintiff

Pacific R. R. Co. v. Nash.

must have relied to obtain a verdict. There were two trials of the case in the district court, and on each a verdict was rendered for the plaintiff. Under such circumstances, this court does not feel inclined to reverse an order of the court below refusing to grant another new trial of the case, and will not do so.

It was claimed in argument, that the turning the horse loose upon the prairie was evidence of negligence, which contributed to the loss, and therefore plaintiff ought not to recover. It is too much to say that turning a horse loose at the distance of four or five miles from the road was in itself negligence. This fact, like the others, was submitted to the jury.

II. The plaintiff in error asked a number of instructions which were refused. It appears however that the court charged the jury, and the charge is not in the record. It is to be presumed that the charge given was the correct law of the case, and if so, it was not necessary to give the instructions asked by the plaintiff in error, even if they were correct, and it can answer no good purpose to examine them.

III. One of the errors alleged is the admission of improper testimony. The witnesses Redman and Jones, were permitted to testify as to whether the railroad track was fenced at or near the place where the horse was killed. The evidence was competent to show the exact condition of the track at the place, as showing whether the horse could or would be likely to pass off the track, with the engine after him.

IV. Another assignment of error is the action of the court toward the jury. We fail to perceive how the remarks made by the court were calculated to intimidate the jury, to influence their determination, or in any way affect their verdict. This was the second trial in the district court, and it was proper enough to insist upon all reasonable effort being made by the jury to agree upon a verdict; but there is

Nashville, &c. R. R. Co. v. Thomas.

not the slightest intimation as to how they should agree. Finding no error, the judgment is affirmed.

All concur.

By THE COURT.—Judgment affirmed.

THE NASHVILLE & CHATTANOOGA RAIL-
ROAD COMPANY v. THOMAS.

5 Hoiskell.

Supreme Court of Tennessee.

Statutes. Injury to cattle. Where a statute requires that in case cattle or other obstructions appear before a train on a railway track, the whistle of the engine shall be blown, the brakes put down, and every possible means employed to stop the train, and provides that a railway company failing to observe these precautions shall be responsible for any damage to persons or property from accidents or collisions upon its road, it is no defense to an action against a railway company for damages to cattle by its train, in a case where these precautions were not taken, to show that a compliance with the statute would not have prevented the injury.

Error from the supreme court of Tennessee.

The facts of the case are stated in the opinion.

NICHOLSON, Ch. J.—This is an action for damages, for the killing of a horse on the Northwestern Railroad. The facts, as stated by the engineer, are these: "He was going in the direction of the cut where the animal was run over. He was traveling at the rate of eighteen miles an hour, when suddenly, as the train was approaching the mouth of the cut where the acci-

Nashville, &c. R. R. Co. v. Thomas.

dent occurred, four or five animals, as he supposed, jumped from the right of the road on the track, about twenty steps in front of the engine, and about fifteen steps from the mouth of the cut. He, as soon as he saw them, blew the signal to put down the brakes, and then very soon blew the signal to take off brakes, as he thought the animals had jumped off on the left hand side."

It is provided by section 1166, subdivision 5, of the Code, that "When any person, animal, or other obstruction appears upon the road, the alarm whistle shall be sounded, the brakes put down, and every possible means employed to stop the train, and prevent an accident. And by section 1167, "Every railroad company that fails to observe these precautions, or cause them to be observed by its agents and servants, shall be responsible for all damages to persons or property, occasioned by or resulting from any accident or collision that may occur." And by section 1168, "No railroad company that observes, or causes to be observed, these precautions shall be responsible for any damages done to persons or property on its road. The proof, that it has observed said precautions, shall be upon the company."

After the circuit judge had charged the jury in strict conformity with these provisions of the Code, the counsel for the railroad company requested him to charge: "That if the jury should find from the proof, that the animal killed jumped upon the track of the road so near the engine that it was impossible for the employees on the train to check and stop it, before it came in contact with the filly killed, or to prevent the accident, and that there was not sufficient time to do more than was done by the defendant, that then defendant would not be liable;" which the judge declined to charge.

This refusal so to charge is assigned as error.

Nashville, &c. R. R. Co. v. Thomas.

It will be observed that the statute is imperative in requiring two specific things to be done when an obstruction appears on a railroad: first, to sound the alarm whistle; and, second, put down the brakes. In the case before us the proof shows that the alarm whistle was not sounded; and the import of the charge requested is, that if the animal jumped on the track so near the engine that it was impossible to check or stop it before it came in contact with the animal, and that there was not sufficient time to do more than was done, then the company should be excused from the consequences for not sounding the alarm whistle. The circuit judge could not have charged as requested, without making an exception to the law which the statute does not make. If the precautions prescribed are not observed, the law tolerates no excuse. It was not a question for the defendant to reason about, when the animal jumped upon the track, as to whether it would do any good or not to sound the alarm whistle; his duty was specific and express to sound it; and the law is equally specific and express, that if he fails to comply the company is responsible. It may be that in the case before us, the sounding of the alarm whistle would have done no good in avoiding the accident; but the law required it to be done, and it was the mode pointed out by law for avoiding responsibility. There was, therefore, no error in refusing to charge as requested; nor was there any error in the judge in declining to charge the second proposition, which was substantially the same as that just noticed.

The judgment of the court below will be affirmed.

BY THE COURT.—Judgment affirmed.

Louisville, &c. R. R. Co. v. Norton.

THE LOUISVILLE & NASHVILLE RAILROAD
COMPANY v. NORTON.

5 *Hoiskell*.

Supreme Court of Tennessee.

Liability of lessee operating railroad for damages. A railroad company which has leased and is actually operating a railroad is liable in damages for injuries caused by its servants in their management of the road. Its liability is not affected by the terms of a contract made with its lessor limiting its responsibility to payment of operating expenses and for making necessary repairs.

Error from the supreme court of Tennessee.

This was an action of trespass for killing the plaintiff's cattle by running the defendant's train over them.

The facts of the case and the questions arising upon them are stated in the opinion. The plaintiff recovered judgment in the circuit court; and the defendant appealed.

FREEMAN, J.—The defendant in error sued the Louisville and Nashville Railroad Company in trespass for killing his stock by running a train over them.

The only questions presented before us and urged as error, grow out of the contract found in the record from which it appears that the Memphis and Clarkville Railroad Company had been placed in the hands of one D. B. Clipp as receiver, under the railroad law of Tennessee (sections 1,100 and 1,101), for failure in paying interest on bonds issued to them by the State, under the Internal Improvement Act of the Legislature.

That Clipp the receiver had entered into an agree-

Louisville, &c. R. R. Co. v. Norton.

ment by which the Louisville and Nashville Railroad Company were to operate the Memphis and Clarkville road, as the contract recites, "under and as the agent of said receiver, and on behalf of the State, on the following terms."

The Louisville and Nashville Railroad Company is to employ all the labor, and purchase all the necessary material for the operation of the railroad, and make monthly payments therefor out of the earnings of the road, "and pay over the excess, above the operative expenses and necessary repairs, to said receiver."

It is among other things provided, that the Louisville and Nashville Railroad Company "is not to be responsible for any other liability arising out of the operating of said road, but said road is to be operated in all respects as the property of the Memphis, Clarkville, and Louisville Railroad Company, under the general advice and direction of the receiver ; but under the immediate control of the general superintendent of the Louisville and Nashville Railroad Company, as the agent of the receiver, with power to appoint a local superintendent, with the advice and consent of the receiver."

It is admitted in argument here that the stock was killed under such circumstances as would make the Louisville and Nashville Railroad Company responsible for it, unless said company is relieved from liability by virtue of the contract above referred to ; but it is insisted that plaintiff in error is but the agent of the receiver, and operating the road on behalf of the State of Tennessee, and that they are not responsible because of this fact, and the further provision of the contract that the Louisville and Nashville Railroad Company are not to be responsible "for any other matter or liability arising out of the operating of said road, than that of paying the hands employed and for necessary repairs."

Louisville, &c. R. R. Co. v. Norton.

It is now well settled that railroad companies are responsible for trespasses committed by their agents or employees in the performance of their duties in such employment. *East Tennessee, &c. R. R. Co. v. St. John*, 5 *Sneed*, 525. A railroad company acts through the instrumentality of its officers and agents. 3 *Head*, 642, 643; 1 *Redfield on Railways*, 511, section 3, and notes.

The rule of law on the question presented in this case, is thus laid down by Mr. REDFIELD, vol. 1, p. 591: "There can be no question of the liability of the company leasing another line of railway, whether within or beyond the limits of the state where the first company exists, for all acts and omissions whereby injury occurs to other parties, while so operating such other line as lessees, to the same extent and in the same manner precisely as if such injury had occurred upon the line of the first company; and it seems," he says, "the inclination of the American courts to hold this, in regard even to those companies who have assumed to operate the roads of other companies, whether temporarily or permanently, whether by express legislative sanction or not." It was so held by the court of appeals of New York, in the case of *Bissell v. Michigan Southern, &c. R. R. Co.*, 22 *N. Y.* 258, where the duties, liabilities, and rights of railroad companies are discussed with great ability and learning.

This being so, we can have no hesitancy in holding that the company actually operating the road by whose agents the injury complained of was done, are responsible for the same. Whatever may be the contract, as between the receiver and the Louisville and Nashville Company, it can have no influence upon the rights of the plaintiff below. A party certainly cannot contract with a third party, either before or after a wrong committed, that he will not be responsible for such wrong to the party upon whom the injury was inflicted, or to

New Orleans, &c. R. R. Co. v. Field.

whom the wrong was done. Such a proposition would be untenable on any sound principle, yet it is the same precisely as the defense here insisted on. The fact that the surplus earnings of the road were to be paid over to the receiver, or inure to the benefit of the state, can make no kind of difference as to the liability of the plaintiff in error.

There are other questions that might be raised on this record, of considerable difficulty and interest, but as they are not presented in the argument before us, and the questions settled in this opinion are conclusive of the case before us, we forbear to discuss them.

The writ of error will be dismissed, and the judgment of the circuit court affirmed.

BY THE COURT.—Judgment affirmed.

THE NEW ORLEANS, JACKSON, & GREAT WESTERN RAILROAD COMPANY v. FIELD.

46 Mississippi, 578.

Fences. Cattle. The common law rule requiring an owner of cattle to confine his stock on his own premises is not in force in Mississippi. In that state, each occupant of lands must secure his fields against the intrusion of animals; and cattle owners may allow their cattle to range on unclosed lands, whether of railroad companies or individuals.

A railroad company is no more bound to fence its lands than an individual. And in an action against a railroad company for an injury to cattle that have strayed upon its track, it is a sufficient defense for the company to show that it employed skillful management for its locomotives, and the injury occurred while it was in the regular prosecution of their lawful business, and could

New Orleans, &c. R. R. Co. v. Field.

not have been avoided by exercise of the degree of skill and care which a discreet man in such circumstances would employ.

The owner of cattle allowing them to run on lands contiguous to the railroad takes the risk of their being killed by the trains, subject to the exercise of due care upon the part of the company.

Error from the supreme court of Mississippi to the circuit court of Hinds county.

This was an action to recover of the railroad company damages for killing a mule belonging to the plaintiff.

The mule, it appeared, was ranging on uninclosed lands of the railroad, strayed on the track, and was killed by the company's train.

Upon the trial, the jury found a verdict for the plaintiff. A motion was made on behalf of the company to set aside the verdict, as against the evidence, and overruled by the court. This action, and the impropriety of instructions given by the court, were assigned for error.

The following instruction to the jury, the fourth among several requested by the defendant, was refused :

"4th. The railroad company, the defendants, had the right to run their train at a reasonable speed, day and night, and that the schedule time of running ought not, in any degree, to be controlled by the liability of stock to wander into the road, or that the company, in determining the rate of speed, should have any special reference to this liability. The speed of the train should be controlled by the custom of railroads and the exigencies of trade and freight, and if the jury believe, from the evidence, that the defendant's train, at the time it crossed the crossing of the Livingston and Jackson road, was running at the usual speed the trains were accustomed to run over that crossing, and that the mule of plaintiff was one hundred and

New Orleans, &c. R. R. Co. v. Field.

fifty yards from the crossing at the time the train so crossed, and got on the track of the road after the train crossed, and that it was impossible to stop the train in time to prevent the accident, then they must find for the defendant."

Yergers & Nugent, and *W. P. Harris*, for the plaintiff in error.

Shelton & Shelton, for the defendant in error.

SIMRALL, J.—This writ of error is prosecuted by the New Orleans, Jackson, and Great Northern Railroad Company, to review the judgment of the circuit court for refusing a new trial, and for alleged error in granting instructions to the jury. The question grows out of the liability of the railroad company for the killing of the plaintiff's mule by one of its freight trains under the circumstances proved on the trial. The subject is discussed and the principle in general terms is stated in *Vicksburg & Jackson R. R. Co. v. Patton*, 31 *Miss.* 176; *Mississippi Central R. R. Co. v. Raiford*, 43 *Id.* 238; 42 *Id.* 606, 607, and other cases.

It is now well established by authority and reason in this state, that uninclosed lands, although private property, are a *quasi* common, or, as expressed in local parlance, a "range," in which the owners of cattle, and domestic animals generally, may permit them to go out at large and depasture without thereby incurring any responsibility as trespassers. The common-law principle, which required the owner to confine his stock on his own premises, and made him a wrong-doer if they escaped into the lands of his neighbor, never obtained in this state. But the converse is the rule; that each occupant of lands must secure his fields by strong and sufficient inclosures against the intrusion of animals; and that the owner cannot be held as a tres-

New Orleans, &c. R. R. Co. v. Field.

passer for their entering a close unless they have broken a fence deemed in law sufficient to exclude them. Uninclosed lands in this state are held subject to this right or easement. Railroad companies, like other proprietors, are not bound to inclose their roads to keep off cattle. They are common carriers, with special franchises granted by the state, to enable them to construct and operate their roads; while their franchises, equipments, and roads are private property, they are public conveniences, instrumentalities encouraged and promoted by the state to carry forward the general progress in the development of population and industries, and their fruits, wealth, public and private. They have become a necessity of modern civilization, and enter largely into the policies of all the states. By their means commerce and travel is mainly conducted.

In this two-fold aspect, therefore, ought they to be considered. First, as proprietors of property, using it for their private gain, but, at the same time, not to be permitted so to use it as to harm or injure others unnecessarily, if to be avoided. In the prosecution of their ordinary business, they put in operation forces powerful and difficult to manage; therefore it is incumbent on them to employ skillful and prudent agents, to guide and control them with vigilance, prudence, and care, so as not to endanger the lives and property of others. They must use the locomotives with such care and diligence upon the road as would be exercised by a skillful, prudent, and discreet person regarding their duty to the company, having a proper desire to avoid injury to property along the road, and liability to be exposed to danger. *Baltimore, &c. R. R. Co. v. Woodruff*, 4 *Md.* 257. Persons living contiguous to railroads have the same right as others, in more remote localities, to turn their cattle upon the ranges; but they assume the risk of their greater exposure to danger.

New Orleans, &c. R. R. Co. v. Field.

The cattle are liable to go upon the road ; the company cannot detain them, *damage feasant*, any more than any other landowner ; nor can they treat them as unlawfully there, and therefore relax their care and efforts to avoid their destruction. The only justification of the company for injury to them is that, in the prosecution of their ordinary and lawful business, the act could not be avoided by the use of such care, prudence, and skill as a discreet man would put forth to prevent or avoid it. The owner of cattle at large on the range takes the risk of injury or total loss by the locomotive and train if the cattle exposed upon the track could not be saved by prudence, skill, and caution. The company is excused and justified where, after using the means suggested by skill, prudence, and caution, the injury or destruction could not be avoided.

In this and all similar cases, the question is reduced to this : Was the accident inevitable ? Did the company's agents and servants exert the skill, the prudence and care incumbent upon them, to avoid the injury and protect the property ? When the injury became probable and imminent, was any thing left undone which might reasonably be supposed would have been available, if it had been done ? Were the agents of the company guilty of negligence ? These are questions of fact to be responded to by the jury, from the evidence ; responded to under the guidance and direction of the court, on the questions of law with which they are compounded.

It is complained by the plaintiff in error that the circuit court erred to his prejudice, by declining to give the fourth prayer for instruction. It has become the settled practice in this court, and, as it seems to us, accords with reason, and is needful to the practical administration of justice, not to disturb the verdict of the jury, if it can be supported by any fair view of the testimony which they may have taken, and had a

New Orleans, &c. R. R. Co. v. Field.

right to take. Although a particular instruction may be refused, which embodies a correct abstract principle, if, looking at all the instructions given, the jury were furnished with full and sufficient guides as to the law to enable them to apply it to all the facts in evidence; if the other charges laid down the law so copiously and fully as that they fairly embraced every view which the jury could reasonably take of the testimony, and their verdict is not against the weight and preponderance of the testimony, so as to do injustice, we would not set aside their verdict. The jury were so instructed in several different forms of speech as to the relative rights and obligations of the parties toward each other, and on the subject of negligence, as to sufficiently guide them, without this fourth instruction.

As to the rate of speed at which trains may be propelled, it is dependent on several considerations; the condition of the road, the usage of railroads generally, the amount of property and passengers offering for transportation; but the principle which underlies the subject is, that the rate of the speed must be reasonable, such as is consistent with the safety of the property and passengers in their care.

Whatever rate be adopted, the company are in no degree to relax efforts to protect cattle from injury. If the convenience and business of the public demand a rapid transportation, they are not restrained from meeting the requirements, because the danger to stock, from a fast train, is greater than a slow one. If the object of the fourth instruction was to enumerate the facts in evidence, and to take the opinion of the court, whether if proved and believed by the jury, they acquitted the company of negligence, all the circumstances bearing upon the point ought to have been included, for the question was to be settled by a consideration of all the circumstances, and not a part of

Trice v. Hannibal, &c. R. R. Co.

them, and the court might have withheld the instruction, as calculated to mislead, because it did not include all that the evidence disclosed, proper to be considered by them.

TARBELL, J., dissented.

BY THE COURT.—Judgment affirmed.

TRICE v. THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY.

49 *Missouri*, 488.

Supreme Court of Missouri; February Term, 1872.

Fences. A statute requiring railroad companies to erect and maintain fences along their tracks, and making them liable to adjoining proprietors for damage caused by a failure to fence, is within the legislative power. The legislature may have no right to subject one person to expense for the sole benefit of another; but in such a statute the protection of the property of adjacent proprietors is merely an incidental object. The main and leading object is the protection of the public. And the liability of the railroad company for such failure to fence extends not only to cases where the traveling public would be endangered by the act which caused the damage to the adjoining owner—as in case of a collision with his cattle—but to cases where, by reason of the failure of the road to fence, cattle stray from the track upon the land bordering the road, and destroy the crops.

Appeal to the supreme court of Missouri from the court of common pleas of Macon county.

Trice v. Hannibal, &c. R. R. Co.

This was an action against a railway company to recover damages for injuries to plaintiff's crops by cattle straying from the line of defendant's railroad upon adjoining land of the plaintiff. The action was brought under the statute of Missouri, making a railroad company liable to an adjoining proprietor for damage caused by the failure of the company to fence in his land along its track.

Upon the trial, the jury rendered a verdict for the plaintiff for the damage proved, and the court, in accordance with statute, entered judgment for double the amount of the verdict. A motion by the defendant in arrest of judgment was overruled; and the defendant appealed.

Carr, and Hall & Oliver, for the appellant.

Dysart & Brown, for the respondent.

BLISS, J.—The pleadings show that defendant's railroad passes through the cultivated fields of the plaintiff; that defendant failed to fence its road, and, in consequence, cattle strayed from the road upon said cultivated fields and destroyed the plaintiff's crops. The cause was submitted to a jury, who returned a verdict for the damages suffered, and the court rendered judgment double their amount. A motion in arrest was filed and overruled, and the defendant claims that the court committed error in not sustaining the motion. It is not disputed that the case comes within the letter of the statute, but counsel claim that the legislature have no power to compel the defendant to fence the plaintiff's crops; that to subject it to expense for the private benefit merely of an adjoining proprietor would contravene various provisions of the constitution.

We will not entertain a proposition to set aside or

Trice v. Hannibal, &c. R. R. Co.

disregard a legislative enactment unless in a clear case, and we do not find such a case made by defendant's counsel. It may be conceded that the legislature has no right to subject one person to expense for the sole benefit of another, and there is plausibility in the claim that the requirement and liability under consideration, so far as they operated to protect the crops growing upon the land through which the railroad runs, is for the sole benefit of the owner of such crops. With the same plausibility it might be claimed that the liability to the owner of stock killed by cars or engines—a liability created by the same section of the statute—is for the exclusive benefit of the owners of such stock. But such is not the theory upon which this statute has been uniformly sustained. While the protection of the property of adjacent proprietors is an incidental object of the statute, its main and leading one is the protection of the traveling public. To insure such protection railroads are imperatively required to fence their track, and the penal liability deemed necessary to enforce this requirement is a matter of legislative discretion. A fine might be imposed or a liability might be created for stock killed or for crops destroyed, either for their value or for more than their value, if the destruction should be caused by a non-compliance with the requirement.

Counsel also claim that because of the leading object of the statute, no liability can be created unless the injury suffered arose under circumstances, as by a collision, where the traveling public would be endangered. The claim is more specious than sound. The nature of the penalty has nothing to do with the power to impose the obligation. If it may be lawfully imposed, those who disregard it may not say that this or that special liability is an improper one, for the power to create the obligation carries with it the power to create liabilities other than those that might arise at

Lloyd v. Pacific R. R. Co.

common law ; and even if we considered such liabilities to be inexpedient or illogical, we could not say that the legislature had transcended its power.

WAGNER, J., concurred.

ADAMS, J., did not sit.

BY THE COURT.—Judgment affirmed.

LLOYD v. THE PACIFIC RAILROAD COMPANY.

49 *Missouri*, 199.

Supreme Court of Missouri ; January Term, 1872.

Fences. Injury to cattle. A statute providing that when any animal is killed by the trains of a railway company, the owner may recover its value without any proof of negligence on the part of the company, except in cases of accident occurring where the road is enclosed by a lawful fence, or at the crossing of a public highway, does not render a railroad company liable, regardless of the question of negligence, for the value of an animal killed at a place not fenced, near the company's station, and which is necessarily left open for the reception and discharge of freight and passengers.

Error from the supreme court of Missouri to the circuit court of Moniteau county.

This was an action against a railway company, to recover the value of the plaintiff's cow, which had been run over and killed by the defendant's train. The action was brought under the Missouri statute (*Wagn. Mo. Stat.* 520, § 5), the substance of which, and the facts in this case, are stated in the opinion.

Eloyd v. Pacific R. R. Co.

J. N. Litton, for the plaintiff in error.

Burke & White, for the defendant in error.

BLISS, J.—The plaintiff brought suit under section 5 of the Damage Act (*Wagn. Stat.* 520) for killing her cow, and showed that at the place where the carcass of the cow was found, the road was not fenced; but it appeared that there was a fence on the south side of the track, and that the ground upon the north side, between the track and the public highway, was contiguous to a railroad station, and was used for receiving and delivering freight, etc. The following instruction, asked by defendant and refused by the court, embraces the only proposition necessary to be considered: "If the jury believe from the evidence that the cow was killed in the open grounds of defendant, at defendant's station, and that it was necessary for the transaction of business with the public, and for its convenience in the reception and discharge of freight and passengers, that such space should be left open, they will find for defendant."

By refusing to give this instruction in connection with the evidence and other rulings, the court held that the railroad company was under obligation to fence its track at its passenger and freight depots, without regard to the inconvenience thereby caused to those who operated the road or to the public; and that, unless such fence was made, the company was liable to pay for all animals killed, without regard to the question of negligence.

This view might be warranted by a literal interpretation of the statute. It provides in general terms that when any animal shall be killed by the cars, &c., the owner may recover its value without any proof of negligence, but that the provision shall not apply to any accident occurring where the road is enclosed by a law-

Lloyd v. Pacific R. R. Co.

ful fence, or in the crossing of any public highway. But such interpretation would hold railroad companies to this extraordinary responsibility unless they should fence up their tracks in towns and villages and at all their places of doing business; in a word, it would obligate them to commit a public nuisance, and to render it inconvenient or impossible to transact their business—to perform, indeed, the office of their creation. The statute should receive no such unreasonable construction, but should be interpreted in connection with section 43 of the chapter concerning railroads (*Wagn. Stat.* 310–11), which obligates railroad companies, among other things, to fence their road where it passes through or along cultivated fields or unclosed prairie lands. It might extend even further than that, but it cannot receive the construction given it by the court below.

This court has uniformly held that railroad companies are under no obligation to fence their track where it crosses the plat of a town or city. *Meyer v. North Missouri R. R. Co.*, 35 *Mo.* 353; *Iba v. Hannibal, &c. R. R. Co.*, 45 *Id.* 469; *Wier v. St. Louis, &c. R. R. Co.*, 48 *Id.* 558. In Indiana, under a similar statute, the exemption is extended to grounds necessary to be kept open for the use of the public or the road. *Indianapolis, &c. R. R. Co. v. Kinney*, 8 *Ind.* 402; *Same v. Oetel*, 20 *Id.* 231.

This proceeding was instituted before a justice of the peace, and under the general statement of the cause of action the plaintiff would be entitled to recover if she could show actual negligence by which her property was destroyed. To enable her to do this, in reversing the judgment the cause will be remanded.

All concur.

BY THE COURT.—Judgment reversed, and cause remanded.

Chicago, &c. R. Co. v. Barrie.

THE CHICAGO & NORTHWESTERN RAILWAY
COMPANY v. BARRIE.

55 Illinois, 226.

Supreme Court of Illinois ; September Term, 1870.

Fences. Injury to cattle. Under the statute of Illinois requiring railway companies to erect and maintain fences along their lines of road, if, where a railroad is enclosed by a sufficient fence, a breach occurs therein by reason of the unlawful act of a stranger, and through such breach cattle get upon the track and are injured, the railroad company, in the absence of negligence on its part, will not be liable, unless the accident happened after the lapse of a sufficient time for the company, in the exercise of reasonable diligence, to have discovered and repaired the breach before the injury occurred.

In an action against a railroad company to recover the value of cattle killed by a locomotive and train on defendant's road, it appeared the cattle could have been seen on the track by the engineer for a distance of more than half a mile; yet he made no effort to avoid the danger, and rushed on at a rapid rate, without any signal to give the alarm. *Held*, that it was gross negligence on the part of the engineer not to stop the train in time to avoid the danger, for which the company should be held responsible, even though the cattle were upon the track without the fault of the company.

Appeal to the supreme court of Illinois from the circuit court of Whiteside county.

The case is fully stated in the opinion.

Henry & Johnson, for the appellant.

Dinsmoor & Stager, for the appellee.

SCOTT, J.—This action was originally commenced before a justice of the peace, by the appellee, to recover the value of stock alleged to have been killed by

Chicago, &c. R. Co. v. Barrie.

the locomotive and train of the appellants. A trial was had before the justice, which resulted in a judgment in favor of the appellee, and the appellants then removed the cause to the circuit court, where a trial was again had, and resulted, as before, in a judgment for the appellee.

The appellants seek a reversal of the judgment principally on the ground that the verdict in the circuit court was against the weight of the evidence, and that it was error in the court not to award a new trial.

The evidence shows, that at the place where the stock of appellee got upon the railroad track, the appellants had hitherto erected and always maintained a good and sufficient fence. The defect in the fence at the time was probably occasioned by the removal of some boards by some men who were engaged in setting poles for the telegraph company. The evidence shows that some workmen were engaged in the vicinity of the place where the stock got upon the track, and it is supposed that, for some purpose, they removed the boards from the fence, and through the gap thus made the stock got upon the track. If this is the true theory of the case, it was simply the unlawful act of strangers, for which the company would not be liable until after the lapse of a sufficient time for the company, in the exercise of reasonable diligence, to have discovered and repaired the injury to the fence. While the company will be held to a high degree of diligence in keeping their fences in good repair, they are not bound to do impossible things, nor are they required to keep a constant patrol, night and day. If their fences should be destroyed and torn down by the unlawful acts of strangers, they would undoubtedly be entitled to a reasonable time in which to discover and repair the same. *Illinois Central R. R. Co. v. Swearingen*, 47 Ill. 206; *Same v. Same*, 33 *Id.* 289.

Chicago, &c. R. Co. v. Barrie.

If the appellants are liable in this instance, it must be solely on the ground of negligence in the agents and servants of the company in running and controlling their train, by reason whereof the stock were killed. That the stock of the appellee were killed by the train of the appellants is not denied, and there is no conflict in fact in the evidence, as to the manner of the killing. The appellants produce no evidence whatever to contradict the theory of the appellee as to the manner in which the stock were killed. It is undoubtedly true, that the law requires evidence, beyond proof simply of the killing of stock on the road by the engine and carriages of the company, to create a liability for the death of the stock. There must be proof of negligence on the part of the agents and servants of the company in charge of the train at the time. The party alleging negligence, takes upon himself the burden of making such proof. The requisite proof of negligence, on the part of the servants of the company in charge of the train at the time of the alleged injury, is not wanting in this instance. We are satisfied that there is enough evidence in the record to support the finding of the jury on that question. It is shown conclusively, that the cattle could have been seen on the track by the engineer, if he had been on the look-out, for a distance of more than half a mile. The accident occurred in daylight. There was nothing to obstruct his view, and yet, with the stock standing on the track in full view, the engineer made no effort to avoid the danger, never slackened the speed of the train, but rushed on at a rapid rate, without any signals, so far as this evidence shows, to give the alarm. The inevitable result of such conduct was the destruction of the appellee's property. It amounts to little less than utter and willful recklessness on the part of the engineer, dangerous alike to his employers, and to everything that might come near his train. If it be

Toledo, &c. R. R. Co. v. Bookless.

true, that the stock could have been seen on the track for the distance testified to by the witnesses, it was gross negligence, and even recklessness on the part of the engineer not to stop the train in time to avoid the danger, for which the company must be held responsible. It was the plain duty of the engineer, when he saw the stock on the track, to have slackened the speed of the train in time to avoid a collision, and not to do so was culpable and gross negligence. *Illinois Central R. R. Co. v. Wren*, 43 *Ill.* 77.

It is not possible that the engineer did not know, from his familiarity with the road, that the company had always maintained a good fence at that point, and that it was something unusual for stock to be on the track in that vicinity, and this fact itself ought to have made him more careful. Perceiving no error in the record, the judgment must be affirmed.

BY THE COURT.—Judgment affirmed.

THE TOLEDO, PEORIA, & WARSAW RAIL-
ROAD COMPANY v. BOOKLESS.

55 *Illinois*, 280.

Supreme Court of Illinois; September Term, 1870.

Fences. Injury to animals. Pleading. The declaration in an action against a railway company, commenced October 30, 1868, to recover for an injury to a colt owned by the plaintiff, resulting from a failure to fence along the track, alleged that "on January 1, 1867, and from thenceforward to the commencement of this suit, the defendants were possessed and had the entire control of" the road, "and had the right to run upon the same locomotives and trains."

Toledo, &c. R. R. Co. v. Bookless.

It also alleged that "the defendant, more than six months after the said railroad was in use, and continuously to the time of committing the grievances," &c., neglected to comply with the requirements of the statute in regard to fences. *Held*, that it did not appear with sufficient certainty that the defendant had failed to erect proper fences after the road had been "opened for use" a period of six months, that time being allowed by the statute; and a demurrer to the declaration must be sustained.

Appeal to the supreme court of Illinois from the circuit court of Iroquois county.

This was an action on the case to recover for an injury to the plaintiff's colt by the defendant's train. The action was brought under the statute of Illinois of 1855.

The declaration alleged that "heretofore, to wit, on January 1, 1867, and from thenceforward to the commencement of this suit, the defendants were possessed and had the entire control of the Toledo, Peoria, & Warsaw railroad, and had the right to run upon the same, locomotives and trains; and the plaintiff avers that during all that time it was the duty of the defendants to erect and keep in repair fences on the side of said railroad, suitable and sufficient to prevent cattle, horses, sheep, and hogs from getting on said railroad, except at the crossings of public roads and highways, and within the limits of towns, cities, and villages, and where the same runs through unenclosed land at a greater distance than five miles from any settlement, and through lands where proprietors had fenced, and except where proprietors had agreed to fence and to construct suitable cattle guards at all railroad crossings of public highways, to prevent cattle, horses, sheep, and hogs from getting on said railroad, &c.; and the plaintiff avers that the defendant, more than six months after the said railroad was in use, and continuously to the time of the committing of the grievances, herein-

Toledo, &c. R. R. Co. v. Bookless.

after mentioned, neglected to comply with the before mentioned requirements, as by the statute in such case made and provided, it was its duty to do, by means whereof one mare colt, the property of the plaintiff, of great value, to wit, of the value of one hundred dollars, on, &c. to wit, on December 1, A. D. 1867, strayed and got on said railroad, but not at any of the various excepted places aforesaid ; and that the defendants, by their servants, so run, conducted, and directed the locomotive and train of the defendant on said railroad, that the said locomotive and train struck, with great force and violence, the said mare colt, so being on the said railroad as aforesaid, by and through the neglect of the defendants to erect and keep in repair the fences and cattle guards, &c., as aforesaid ; and the same did then and there wound, injure, and greatly damage the said mare colt, the property of the plaintiff, to wit, at the county aforesaid, to the damage of the plaintiff of one hundred dollars, and therefore he sues, &c.

The defendants interposed a special demurrer to the declaration, alleging the following grounds of demurrer :

1. Said declaration does not allege that defendant's railway was open for use six months prior to the injury complained of.
2. Said declaration does not allege that that part of said railway where said animal was killed had been open for use six months prior to the injury complained of.
3. It does not allege that a fence was necessary at the place where said animal got on the track of said railway.
4. It does not allege a venue where said animal got on the track of said railway, and does not lay a venue for any of the averments of said declaration, except as to the injury of the animal.

The circuit court overruled the demurrer, and judg-

Toledo, &c. R. R. Co. v. Bookless.

ment by *nil dicit* was rendered for the plaintiff, from which the defendant appealed.

Bryan & Cochran, for the appellant.

Blades & Kay, for the appellee.

MCALLISTER, J.—This was an action on the case, founded upon the statute of 1855, requiring railroad corporations, under certain circumstances, and with certain exceptions therein specified, to erect and maintain suitable fences on the sides of their railroads, and making them liable for stock killed on their roads in case of failure to do so. The declaration contains but one count, to which appellants filed a special demurrer, which was overruled by the court, and judgment *nil dicit* rendered against appellants. The sufficiency of this declaration, challenged by special demurrer, is the only question presented. We think it is not sufficient.

The first section of the act in question requires every railroad corporation, within six months after their lines, or any part thereof, shall have been opened for use, to erect and maintain a suitable fence on the sides thereof, or the part thereof "so open for use."

The declaration alleges, that the defendants, on January 1, 1867, and from thenceforward to the commencement of this suit, were possessed and had the entire control of the Toledo, Peoria, & Warsaw railroad, and had the right to run upon the same. locomotives and trains."

"And the plaintiff avers, that the defendants, more than six months after the said railroad was in use, and continuously to the time of the committing of the grievances, &c., neglected to comply with the before mentioned requirement, as by the statute in such case made and provided, it was its duty to do."

These allegations are argumentative, and may *tend* to show that the line of this railroad, or some part

Toledo, &c. R. R. Co. v. Bookless.

thereof, was "open for use," and that, for the period of six months after it was so open for use, appellants failed and neglected to erect fences on the side of their road, suitable and sufficient to prevent cattle, &c. from getting on such railroad. But it is a mere tendency, and so lacking in certainty, that it will not stand the test of a special demurrer. This corporation may have had the possession, entire control of, and right to run locomotives and trains on the road, without the same having been "opened for use." By the statute, the railroad corporation has the full period of six months after the line, or some part of it, shall have been opened for use, in which to erect fences along the sides of so much as has been so opened for use, and no cause of action can arise for killing stock, in the absence of negligence in the act, until after the lapse of the six months. It is not alleged in this declaration, that it was after the lapse of six months from the time the line, or some part of it, was so opened for use, that the colt got upon the track. The declaration is negligently and unskillfully drawn, and it is not worth while to waste time in pointing out all of its insufficiencies. It does not even show that the railroad was located anywhere in this state. The demurrer should have been sustained. The judgment must be reversed and the cause remanded.

BY THE COURT.—Judgment reversed, and cause remanded.

Sawyer v. Vermont, &c. R. R. Co.

SAWYER v. THE VERMONT & MASSACHUSETTS RAILROAD COMPANY.105 *Massachusetts*, 196.*Supreme Court of Massachusetts ; October Term, 1870.*

Fences. A railroad company had commenced and partly completed the construction of its road,—the track being partly graded but the rails not laid,—when a statute requiring railroad companies to erect and maintain fences along their roads was passed. The company was chartered before, but the location of the road was not filed until after the passage of the act, and no other title from the owner was shown. *Held*, that the company was under obligation to fence according to the requirements of the statute; and having failed to do so, it was liable, under the statute, in damages, for causing the death of a horse which escaped upon the track for want of a fence, and was there killed by a locomotive of the company.

Cause reported for the decision of the supreme court of Massachusetts from the superior court.

This was an action of tort for killing a horse owned by the plaintiff by a locomotive on the defendant's railroad. By consent of the parties, the case was reported for the decision of the supreme court, as follows:

“At the trial, it appeared from the testimony of Moses Sleeper and Aaron Bruce, that the plaintiff had leave to put his horse in the shed or stable on the land of the Beckwith Company; that the only traveled access to the land and stable thereon was by a path from the street running thereby; that the land was traversed by the track of the defendants' railroad; that the road was located across the land and was unfenced; that on December 3, 1869, the horse, upon Sleeper's going into the stable, broke away, backed out of the

Sawyer v. Vermont, &c. R. R. Co.

stable, escaped from Sleeper, played a little while on the land of the Beckwith Company, and went directly from said land, without going on other land, upon the track of the defendants, where it was killed by a passing train; that Sleeper endeavored to catch the horse, and was pursuing it when it was killed; and that the horse did not reach the track by the path before referred to, which led from the street to the stable; but that there was no limitation in the license to use the stable, requiring any particular avenue of access thereto.

"It was further agreed that the railroad was commenced and partially completed in the first section thereof, which included the portion where this occurrence took place; that the bridges were built and the track partly graded; but that the rails were not laid; at the time of passage of the statute of 1846, ch. 271, relating to the fencing of railways. The location of the road was filed June 14, 1847, and the charter therefor was granted before the passing of the statute of 1846. There was no evidence of any deed from the Beckwith Company or their grantors to the railroad corporation of the land where the accident occurred, but it appeared to have been taken by the defendants under the location of their road.

"The testimony of Sleeper and Bruce not being disputed, and there being no fact in controversy, the case is reported for the decision of the supreme judicial court, by consent of both parties. If the plaintiff is entitled to recover, it is agreed that the value of the horse was two hundred dollars, and judgment is to be entered for that sum; otherwise, for the defendants."

A. Norcross, for the plaintiff.

C. H. B. Snow, for the defendants.

The railroad having been partially constructed before the passage of the statute of 1846, neither the

Sawyer v. Vermont, &c. R. R. Co.

letter nor the spirit of the statute required the corporations to erect fences. *Stearns v. Old Colony, &c. R. R. Co.*, 1 *Allen*, 493.

As the plaintiff had nothing more than a license to put his horse in the shed of the Beckwith Company, the horse cannot be said to have been lawfully on the adjoining land, even though there accidentally; and therefore the case falls within *Eames v. Salem, &c. R. R. Co.*, 98 *Mass.* 560.

CHAPMAN, Ch. J.—It appears that the defendants commenced, and partially completed, the first section of their railroad before the enactment of the statute of 1846, ch. 271. They built the bridges and partly graded the track, but did not lay the rails. This section included the place where the plaintiff's horse was injured; but it does not appear what its length was, nor by what right, in addition to obtaining a charter, they entered upon the land. They filed their location June 14, 1847, and do not appear to have obtained any other title from the owner. He had a right to have his damages assessed as of this date, and of course the expense of fencing would not be included in them. *Stearns v. Old Colony, &c. R. R. Co.*, 1 *Allen*, 493; *Charlestown Branch R. R. Co. v. County Commissioners*, 7 *Metc.* 78; *Baxter v. Boston, &c. R. R. Co.*, 102 *Mass.* 383. The defendants would be obliged to fence the land according to the requirements of the statute.

The fact is not stated that the plaintiff's horse was rightfully on the adjoining lot; but a jury might legally have found, from the circumstances stated, that he was there by license from the owners of the land; and as the case comes up by consent of parties in the form of a report, one of the terms of which is that if the plaintiff is entitled to recover, judgment is to be entered for him, we must treat as a fact whatever a

Eames v. Worcester, &c. R. R. Co.

jury would have been authorized by these circumstances to find. The horse thus being on the land rightfully, and having escaped upon the track for want of a fence which the defendants were bound to erect, this action can be maintained.

BY THE COURT.—Judgment for the plaintiff.

**EAMES v. THE WORCESTER & NASHUA
RAILROAD COMPANY.**

105 *Massachusetts*, 198.

*Supreme Court of Massachusetts; October Term,
1870.*

Deeds. Right of way. Fences. In a conveyance of a strip of land to a railroad company for the location of its road, a reservation of "a right of way for carts, teams, and cattle, within the location aforesaid, where the said way now exists, the same to be made and kept by the grantees in a convenient state of use for the purposes aforesaid," implies that the company is to keep the way open, and unobstructed by gates, bars, or other barriers, if the existing way referred to is, at the time, open and unobstructed.

No obligation to erect and maintain gates or other barriers across such a way is imposed by a statute requiring railroad companies to "erect and maintain suitable fences, with convenient bars, gates, or openings therein, at such places as may reasonably be required, upon both sides of the entire length" of their roads, "except at the crossings of a turnpike, highway, or other way, or in places where a convenient use of the road would be thereby obstructed."

Cause reported for revision to the supreme court of Massachusetts from the superior court.

Eames v. Worcester, &c. R. R. Co.

This was an action of tort for killing a cow owned by the plaintiff, by a locomotive on the defendant's railroad.

Upon the trial, a verdict for the defendant was directed by the court on the evidence; and the case was reported to the supreme court for revision as follows:

"The plaintiff was a farmer, owning a farm in Worcester, traversed by the defendant's railroad track. He had owned this farm since 1843. The defendants' road was constructed in 1848. It traversed the plaintiff's farm, for a distance of about seventy rods, between his buildings and the highway from Worcester to West Boylston. The plaintiff quitclaimed to the defendants so much of his land as was included in the location of their road, for the compensation awarded him by the commissioners.

"Before the construction of the railroad, and ever since, a way existed and was constantly used by the plaintiff, between his house and said highway; and in his deed to the defendants the plaintiff reserved a right of way where said way crossed their location, in the following words: 'Reserving to myself, my heirs and assigns, a right of way for carts, teams, and cattle, within the location aforesaid, where the said way now exists, the same to be made and kept by the grantees in a convenient state of use for the purposes aforesaid.'

"The defendants constructed cattle guards across their track on both sides of the way, but never erected any gate, bars, or other barrier across the way, and the plaintiff never requested them to do so, and the way always remained open after the construction of the railroad, the same as before.

"The plaintiff was raiser and owner of a great number of cattle; and testified that he had been subjected to great inconvenience in driving them back and forth across the railroad by this way. In September, 1868, a

Eames v. Worcester, &c. R. R. Co.

heifer belonging to him escaped from his pasture, beyond and not adjoining the railroad, and while he was attempting to drive it back escaped from his control, ran along the highway into his way aforesaid, and upon the defendant's track at the crossing, and was there killed by a passing locomotive; and this action was brought to recover its value. There was no evidence that the plaintiff was not in the exercise of due care, and none that the defendants were negligent in the management of their locomotive.

"The judge ruled that on the evidence the plaintiff could not maintain his action, directed a verdict for the defendants, and reports the case for the revision of the supreme judicial court, the verdict to stand or be set aside as that court may direct."

W. W. Rice, for the plaintiff.

The plaintiff relies upon the statute of 1846, ch. 271 (*Gen. Stat.* ch. 63, § 43), which provides that the railroad corporation "shall erect and maintain suitable fences, with convenient bars, gates, or openings therein, at such places as may reasonably be required, upon both sides of the entire length of any railroad" constructed since May 16, 1846, "except at the crossings of a turnpike, highway, or other way, or in places where a convenient use of the road would be thereby obstructed; and shall also construct and maintain sufficient barriers at such places as may be necessary, and where it is practicable so to do, to prevent the entrance of cattle upon the road."

The statute imposes upon railroad corporations the obligation of preventing the entrance of cattle upon their roads wherever it is necessary and practicable so to do. The word "way," in the statute, to which this obligation does not extend, does not mean a private way. The way reserved by this plaintiff is merely a private way, and should be protected by the railroad

Eames v. Worcester, &c. R. R. Co.

corporation in the same manner as other private ways and farm crossings, which it is its duty to provide with gates, bars, or other sufficient barriers.

The reservation in the plaintiff's deed provides that the way reserved shall be kept by the defendants in a convenient state of use for the purpose of the way. This would authorize them to maintain a gate or bars; and having failed to do so, they are liable for the damage resulting from the failure. *Indiana Central Railroad Co. v. Leamon*, 18 *Ind.* 173.

F. P. Goulding, for the defendants.

COLT, J.—The plaintiff puts his right to recover on the ground that there existed a legal obligation upon the defendants to erect and maintain convenient gates, bars, or other barriers, across the open way between his house and the highway, where it crossed the railroad. There was no evidence that the plaintiff was not in the exercise of due care, and none that the defendants were negligent in any other respect.

The defendants acquired their title to the location over the plaintiff's land by deed reserving the way in question. We do not find anything in the terms of the reservation, which imposes upon the corporation the duty alleged. It is to be construed by the condition of things at the time the deed was made. And although, strictly speaking, the way across the land conveyed was then first created by the reservation (because a man cannot have an easement on his own land) yet it is to be considered that the traveled path existed long before, had practically defined limits, and was appropriated to a known use as a passageway. In common acceptance, it was an open and unobstructed way, and is referred to in the reservation itself as a way then existing. In the absence of express stipulation, the parties must be deemed to have intended to preserve

Eames v. Worcester, &c. R. R. Co.

and continue a way for the plaintiff's use, as it then was, open and unobstructed; and this has been the construction put upon its terms, apparently, by the acquiescence of the parties, from the time the railroad was built.

Nor is there anything in the statute of 1846, ch. 271, re-enacted in the *Gen. Stat.* ch. 63, § 43, which requires the closing of this way by gates and bars, contrary to the agreement and intention of the parties. By the statute, fences are to be erected on both sides of the entire length of the railroad, but with convenient bars, gates, and openings at such places as may reasonably be required, and except at the crossings of a turnpike, highway, or other way. The road is not to be wholly inclosed by fences and gates; but, as is provided subsequently in the same statute, sufficient barriers are to be constructed and maintained at such places as may be necessary, that is, where there are no fences and where it is practicable to prevent the entrance of cattle upon the road. In other words, where openings are reasonably required, and at highway and certainly some descriptions of private crossings, especially those which are more important than mere farm crossings, the railroad is to be protected by cattle guards or culverts, built across or under the track, and which, while they do not obstruct it, will serve as barriers to prevent the entrance of cattle.

The case finds that the defendants had constructed such cattle guards across their track, on both sides of the way in question; and there is nothing to show that they had not complied in this instance with the reasonable requirements of the statute.

BY THE COURT.—Judgment on the verdict.

Antisdel v. Chicago, &c. R. Co.

**ANTISDEL v. THE CHICAGO & NORTHWEST-
ERN RAILWAY COMPANY.**

26 Wisconsin, 145.

Supreme Court of Wisconsin; June Term, 1870.

Fences. Pleading. An allegation in a complaint that certain colts and sheep owned by plaintiff, having strayed, without any fault of the plaintiff, upon the track of the defendant, a railway company, the defendant "so carelessly and negligently ran and managed its locomotive and cars, and its railroad track, grounds, and fences, that its locomotive and cars ran against and over said horses and colts," &c., is not a sufficient statement of a cause of action for injuries caused by neglect of the company to maintain proper fences, in consequence of which the animals strayed on the track and were killed.

But as such an allegation sufficiently avers negligent management of the train, it will be presumed, on appeal, in order to sustain a judgment for the plaintiff, that there was evidence on the trial to warrant a recovery on that ground, where the bill of exceptions does not purport to contain all the evidence.

A statute which requires railroad companies to erect and maintain fences along their tracks, and makes them liable, in case they neglect to do so, for all injuries to animals straying upon their tracks, imposes upon them the duty of exercising a high degree of diligence in keeping such fences in repair. Ordinary diligence, as usually defined, is not sufficient.

Appeal to the supreme court of Wisconsin from the circuit court for Rock county.

This was an action against a railroad company for killing colts and sheep owned by the plaintiff, they having been run over by a train on the defendant's road.

Upon the trial, the jury rendered a verdict for the plaintiff. A motion by the defendant for a new trial

Antisdel v. Chicago, &c. R. Co.

was denied, and judgment against it entered on the verdict. The defendant appealed.

A. A. Jackson, for appellant.

The allegations in the complaint that the plaintiffs cattle "casually . . . strayed" upon the track of defendant company, of itself shows that they were trespassing. *T. R. R. Co. v. Munger*, 5 *Den.* 255; 4 *Comst.* 349; *Railroad Co. v. Rehman*, 5 *Law Reg. N. S.* 49.

At common law no suit could be maintained for injuries resulting from negligence of the defendant in such a case. *Bennett v. C. & N. W. Railway Co.*, 19 *Wis.* 145; *Munger v. T. Railroad Co.*, 4 *Comst.* 349; 5 *Den.* 255; *Halloran v. Railroad Co.*, 2 *E. D. Smith*, 257; *Marsh v. Railroad Co.*, 14 *Barb.* 364; *Bowman v. Railroad Co.*, 37 *Id.* 516; *Mentges v. Railroad Co.*, 1 *Hill.* 425; *Railroad Co. v. Rehman*, 5 *Law Reg. N. S.* 49; *C. & M. Railway v. Patchin*, 16 *Ill.* 198; *G. W. Railway Co. v. Thompson*, 17 *Id.* 131; *Quimby v. W. C. Railway*, 23 *Vt.* 387; *C. & T. Railway Co. v. Rockafellow*, 17 *Ill.* 541; *Railroad Co. v. Skinner*, 19 *Pa. St.* 298.

If plaintiff could maintain action at all for his loss it would be under chapter 268 of *Laws of 1860*, which makes the company liable for injury to cattle occasioned by their neglect to maintain sufficient fences and cattle guards, but no allegations are made in the complaint sufficient to show cause of action on this ground. *Allen v. Patterson*, 7 *N. Y.* 476; *Mann v. Morewood*, 5 *Sandf.* 564; *Van Sant. Pl.* 2nd ed. 215, 216.

If the provisions of the statute as to maintaining fences have been complied with, and animals stray upon the track, the common law rule fixes the liability of the company, and the owner can only recover for injuries wilfully inflicted. *Bennett v. Railway Co.*, 19 *Wis.*, 145.

Antisdel v. Chicago, &c. R. Co.

Williams & Sale, for respondent.

Railroad companies are liable for injuries where they have not exercised the utmost degree of diligence in complying with the statute requiring them to maintain fences. *Blair v. Railroad Co.*, 20 *Wis.* 254; *McCall v. Chamberlain*, 13 *Id.* 637; *Bennett v. Railroad Co.*, 19 *Id.* 145; *Hegeman v. Railroad Co.*, 13 *N. Y.* 9; *Smith v. Railroad Co.*, 19 *Id.* 127.

PAINE, J.—This action was brought to recover for some colts and sheep of the plaintiff, which got on the defendant's track and were killed. There is nothing in the evidence contained in the bill of exceptions, tending to show any negligence in the management of the train at the time of the killing; but it all relates to the question whether the fence through which the animals escaped on to the track was kept in proper repair by the company.

The defendant's counsel, on the trial, objected to any evidence, on the ground that the complaint did not state facts sufficient to constitute a cause of action. If it could be assumed that the only cause of action attempted to be stated was based upon negligence of the company in repairing the fence, this objection probably should have been sustained. The allegation is, that the animals having strayed upon the track without any fault of the plaintiff, the company "so carelessly and negligently ran and managed the said locomotive and cars, and the said railroad track, grounds, and fences, that its said locomotive and cars ran against and over said horses and colts," &c. This is the only allegation imputing any negligence in respect to the fence. A fence is from its nature incapable of any management or mismanagement, at the very time of the injury, like a locomotive. It would be at least an inapt expression to say that the company so negligently "*managed*" its fence that by reason of such neg-

Antisdel v. Chicago, &c. R. Co.

ligence the animals escaped upon the track. But after averring that they got casually upon the track, without alleging any negligence of the company contributing to that result, to then say that an averment that the company "so carelessly ran and managed its cars and fences" that they were run over and killed, was a sufficient statement that the company neglected to keep its fences in repair, whereby the animals escaped upon the track, would be an instance of liberality in construction inconsistent with that provision of the Code which requires the complaint to contain a plain and concise statement of the facts constituting the cause of action.

But the objection seems to have been properly overruled for the reason that the complaint sufficiently alleges negligence in the management of the cars at the time of the killing. They were capable of management at that time, in which negligence might occur. And the general allegation that they were so carelessly and negligently run and managed that by reason of such negligence the injury was caused, is sufficient.

But, as we hold the complaint sufficient upon this ground, and insufficient upon the other, the question arises whether the motion for a new trial should have been granted, upon the ground that the verdict was against the evidence. If the bill of exceptions purported to contain all the evidence, we should be obliged to answer this question in the affirmative. As the complaint only states a cause of action for negligence in the management of the cars, there being no proof tending to show such negligence, the verdict should have been set aside. But the bill does not purport to contain all the evidence, and it is then always presumed that there was other evidence, justifying the rulings of the court below. The fact that this evidence appears to have been reported by a stenographer, makes no difference in this respect.

The only other questions relate to the instructions

Antisdel v. Chicago, &c. R. Co.

asked by the defendant, and refused. Most of those asked were given, and the charge, as a whole, was very fair, and all that the defendant could ask, unless there was error in the refusal of one or two.

The court refused to charge that "the defendant was required to exercise only ordinary care and diligence in maintaining the fence along its road." The question presented by this refusal is somewhat similar in principle to that discussed in the opinion of this court in *Ward v. Town of Jefferson*, 24 *Wis.* 342. That related to an injury from a defect in a highway. And the judgment was reversed because the court told the jury that the town was only bound to use ordinary care and diligence in keeping the highway in repair. But that conclusion was based upon the facts, that the statute imposed an absolute duty upon towns to make their roads sufficient, and that the defect there complained of was one that had long existed, and related to the original sufficiency of the road. For these reasons it was held not to be a question of care and diligence, but a simple question whether the town had ever complied with the imperative requirement of the statute to make the road sufficient. And the case was distinguished from one where the road was once properly constructed, and, by some accident or unforeseen event, got suddenly out of repair. In the latter case it was conceded that a question of care and diligence would arise.

The duty imposed by statute upon railroad companies, to fence their roads and keep the fences in repair, and the liability for all injuries to animals arising from neglect to do this, are as absolute as those imposed on towns in respect to highways. But in this case, the question, as to a part of the animals at least, arises upon a defect occurring in the fence after it had once been properly constructed. Is the rule of ordinary care and diligence the one which the law applies to

Antisdel v. Chicago, &c. R. Co.

such a case? As already stated, the language of the statute is unqualified. It makes both the duty and the liability absolute. But notwithstanding this, the courts have introduced a qualification, based upon the presumed intention of the legislature not to require impossibilities or impose unreasonable burdens upon the companies. And it has been held, that where their fences get out of repair by some accident or event beyond the control of the company, they are not responsible if the repair is made with reasonable diligence. *Railroad Co. v. Truitt*, 24 *Ind.* 162; *Railroad Co. v. Swearingen*, 33 *Ill.* 289. The question then is: What is reasonable diligence? Ordinary diligence, as usually defined, seems hardly adequate. It is defined as such diligence as the mass of mankind, or as men in general, use in managing their own affairs. If the instruction meant that the company was only bound to use such diligence in keeping its fences in repair, as men in general use in respect to theirs, it was clearly erroneous. Such a rule would be unsafe in the extreme. And yet, without further explanation, this is what a jury would naturally understand it to mean. But even if it were explained to mean that it required of the company the same degree of care and diligence that men of ordinary prudence would exercise in fencing a railroad, provided that they had one to fence, and were bound by law to fence it, still the necessity of such an explanation shows that the standard of ordinary care and diligence is really inapplicable to such a case.

It is a question of qualifying a liability imposed by statute, which in its terms is absolute. And it does not seem unreasonable to say, that in such a case reasonable diligence is a high degree of diligence, exceeding that which men in general exercise in their own affairs. The case above cited from Illinois seems to lay down the true rule upon this subject. It says, the company is not obliged to have "a patrol at all times,

Jackson v. Chicago, &c. R. Co.

night and day, passing along the road to see the condition of the fence. *If this is done daily*, and they shall at once, when informed of its insufficient condition, make the necessary repairs, they should not be held liable." And again it says: "And the road must be held to a *high degree of diligence* in the performance of this duty, but not to an impossible or unreasonable extent. I think, therefore, that the instruction requiring only ordinary care and diligence was properly refused."

The other instruction refused was properly refused, because it ignored the possibility of negligence, or of willfulness and design, at the time of the killing. After refusing it, the court gave an instruction in the same language, with the addition of an exception holding the company liable, notwithstanding it was without fault in respect to the fence, provided the killing was done negligently or willfully. This exception is contained in the statute itself, and the ruling upon the point was entirely correct.

BY THE COURT.—Judgment affirmed.

JACKSON v. THE CHICAGO & NORTHWEST-
ERN RAILWAY COMPANY.

81 Iowa, 176.

Supreme Court of Iowa; December Term, 1870.

Damages from fire. Negligence. A railway company is liable in damages for the destruction of property adjoining its road, by fire communicated from sparks emitted from a locomotive on its road,

Jackson v. Chicago, &c. R. Co.

if such emission results from the negligent acts of the servants of the company, or the unskillful construction of the engine.

The omission of a railway company to use the best contrivances known to prevent the spread of fire from its locomotives is negligence, for which the company is liable for all injuries to others resulting from the want of such attachments.

Appeal to the supreme court of Iowa from the Story district court.

This was an action for damages resulting from fire upon the plaintiff's land, caused by sparks and cinders emitted from a locomotive used on the defendant's railway.

Upon the trial, the jury rendered a verdict for the plaintiff; and from the judgment entered thereon the defendant appealed.

Withrow & Wright, and *Henderson & Merriman*, for the appellant.

J. S. Frazier, for the appellee.

BECK, J.—The errors assigned in this case relate to instructions to the jury, given and refused, and the order of the court overruling a motion for a new trial, based upon the ground that the verdict is contrary to the law as given to the jury, and not supported by the evidence.

The questions presented for our determination relate to the liability of the defendant for the negligent and careless acts of its servants and the unskillful construction of an engine used by it, whereby fire was communicated to plaintiff's premises. The petition expressly charges that the damage, for which recovery is sought, resulted from carelessness in operating an engine used upon defendant's road, and from its unskillful and defective construction.

Jackson v. Chicago, &c. R. Co.

That a railroad corporation is liable on account of acts done in a negligent, careless, or unskillful manner by its servants, in the prosecution of its business, whereby fire is communicated to the property of another, resulting in loss, cannot be doubted. And it is equally well settled that they are liable in such cases for the want of ordinary care and prudence exercised by their servants. The care exercised by a party whose act results in loss to another in order to relieve him from liability depends upon the character of the act done, the nature of the elements or instruments used, and all the surrounding circumstances. It is evident that one using a dangerous instrument, body, or element will be held to greater care and prudence than another using those of less destructive character. What would be negligence in handling a loaded gun would not be carelessness in the use of a walking-stick. Gunpowder or nitro-glycerine handled with no more care than an ordinarily prudent and cautious man exercises over harmless agents would be the most criminal negligence. Fire being a destructive element, persons using it are required to exercise all reasonably careful and prudent precautions against its spread. This rule applies in all cases where it may be used, without regard to the purpose of its use, and is held to extend to those operating railroad locomotives.

What will amount to negligence in such cases is a question for the jury. *Huyett v. Philadelphia, &c. R. R. Co.*, 23 *Pa. St.* 373; *Fields v. New York Central R. R. Co.*, 32 *N. Y.* 339.

The care and prudence required by the law to prevent the spread of fire from a locomotive is not deemed to be exercised unless some proper precautions are used for that purpose. *Lackawanna, &c. R. R. Co. v. Doak*, 52 *Pa. St.* 379. Ordinary care and prudence require the use of the best contrivances known, and unless such are used, it will be considered negligence.

Jackson v. Chicago, &c. R. Co.

One who fails to use the best means within his reach to prevent the destruction of property does not exercise the care of a man of common prudence. An ordinarily prudent man, in such a case, will resort to all expedients known to him to be efficient. The rule is not only just and necessary in its application to railroad corporations, for the preservation of property, but will stimulate discoveries of contrivances and the making of experiments, with a view to ascertain means that will most nearly remove all liability to fires communicated by railway locomotives. It thus tends to the direct benefit of railroad corporations, as well as of those whose property is exposed to destruction by their locomotives.

The instruction given by the court accords with the views above expressed; those refused are in conflict therewith.

Defendant insists that the verdict is not supported by the evidence. As we have seen, the question of negligence is one for the jury. There was evidence tending to establish negligence. It was shown that sparks and coals of unusual size were thrown out of the smoke-stack of the locomotive. They were of twice or thrice the size of those usually observed, and the jury were authorized to conclude, from the evidence, that if the engine had been in proper repair, or proper contrivances were attached to it, such coals of fire could not have been emitted. There is no dispute that the fire originated from the coals so thrown out by the engine. The evidence introduced by plaintiff, in our opinion, fairly makes out a *prima facie* case of negligence on account of defect in the engine, carelessness of those operating it, or want of proper attachments to prevent the spread of fire. The evidence for defendant fails to show that the engine was provided with such attachments, or that proper care was used in running it.

BY THE COURT.—Judgment affirmed.

THE KANSAS PACIFIC RAILWAY COMPANY
v. BUTTS.

7 Kansas, 808.

Supreme Court of Kansas ; January Term, 1871.

Negligence. Appeal. When the facts are agreed, what constitutes negligence is a question of law, and an appellate court can determine what is shown in the facts as readily and as fully as the court from which the appeal is taken.

Negligence. Where a railway company is authorized to operate its line with locomotives propelled by steam, generated by fire, and uses a locomotive, provided with all the most approved appliances in use for preventing injuries by the escape and communication of fire therefrom, in good order, and operated by competent and careful servants of the company, if, owing to a high wind, fire escapes, and spreading, burns the property of another, this is not negligence on the part of the company.

Allowing standing grass and weeds to remain on the right of way and in the ditch beside the track of a railway company, is not necessarily negligence on the part of the company, making it liable for damages from the spreading of a fire communicated from the company's engine.

Error from the supreme court of Kansas to the Davis district court.

This was an action for damages to a corn-crib and other property of the plaintiff by fire communicated from a passing locomotive engine of the defendant.

The question was tried upon an agreed statement of facts, which are set forth in full in the opinion of the court. From these facts the court decided that the defendant was guilty of negligence, and that such negligence occasioned the injury, and gave judgment for the plaintiff. The defendant excepted, and brought his petition in error to review the judgment.

Kansas Pacific R. Co. v. Butts.

Edgar W. Dennis, for the plaintiff in error.

Gilpatrick & Gilbert, for the defendant in error

KINGMAN, Ch. J.—The plaintiff below brought this action to recover damages alleged to have been sustained by the burning of a corn-crib, some corn, a corral, and other property of his, by fire averred to have been carelessly communicated from a passing locomotive engine of the defendant. The answer was a general denial. The case was submitted to the court, without a jury, upon an agreed statement of facts, of which the following is a copy :

“At the time of the happening of the alleged grievances complained of, the defendant was a railway corporation existing by law, authorized to operate a railway over the line described in the petition, and to haul thereon at all times trains of cars drawn by locomotives propelled by steam generated by fire; that at the time and place mentioned in the petition, about five or six miles west of Junction City station, a locomotive engine of the defendant passed westward drawing a train of cars and run in the usual manner on a regular trip in the defendant's lawful business; that a high wind was blowing at the time; that by this means quantities of live coals and embers were blown from the ash-pan of said engine into dry grass and weeds standing upon the right of way, and scattered along and lying in the ditch beside the track of the railway of the defendant, whereby the same were ignited in several places within the distance of one-half mile; that such fire, so kindled, and driven by said wind, ran rapidly to dry grass and weeds standing on the premises of the plaintiff immediately adjacent, and spreading on said premises produced the damages complained of; that said engine was provided with all the most approved appliances in use for preventing injuries

Kansas Pacific R. Co. v. Butts.

by the escape and communication of fire therefrom to property or combustible material upon or adjacent to the line of the railway, including an appliance for conducting water to the ash-pan, and was in good order and was operated by competent and careful servants of the defendant; that from engines of the same make, and properly constructed and operated, burning coals and embers are sometimes blown by a high wind; and that the plaintiff suffered injury from the destruction of his property by said fire to the amount of five hundred dollars."

From this agreed statement of facts the court found "that the defendant negligently destroyed the property of the plaintiff as set forth in the petition," and assessed his damages accordingly. The sole question below, and in this court, is a question of law, and that is, whether, on the agreed facts, the law attaches negligence to the defendant. And here it may be proper to correct an error into which the defendant in error has fallen for want of proper consideration of the question. He contends that only so much of the foregoing facts are to be considered as tend to support the plaintiff's petition; that the defendant could not under his general denial give in evidence any of the facts that show a want of negligence. It need not be determined whether such evidence was admissible under the pleadings, because there was no exception, and all the agreed facts went to make up the evidence in the case. It is too late to object to any part of it in this court as irrelevant. Again: remarks made in other cases that this court will not weigh evidence and reverse judgments because the preponderance seems to us to be against the verdict, because we have not the same opportunities to observe the bearing of witnesses, and scrutinize the manner of giving their testimony as have the jury, have no application to this case. Here the facts are agreed, not controverted. They are not

Kansas Pacific R. Co. v. Butts.

testimony to be weighed, but facts to be considered; and this court can do that as well as the court below. It may be true that when in great doubt, in such a case, this court will give proper weight to the judgment of the court below; but it certainly will not allow that judgment to control the positive opinions they may form. These remarks are made in answer to a large part of the argument of the defendant in error, and to remove any doubt, if any were really entertained, as to the exact status of such a case in this court.

The point to be decided then is, whether the law attaches negligence to the plaintiff in error on the facts of this case. "So use your own, as not to injure another's," has become a maxim in our laws, and is applied to regulate the conduct of individuals as to the use of their property, and is enforced by giving compensation for injuries wrongfully occasioned by a violation of the principle which the maxim involves. The difficulty lies in giving proper application to the principle rather than in any uncertainty in the principle itself. It is true, that it is *prima facie* competent for any one to enjoy and use his property as he chooses; but he must however so enjoy and use it as not to affect injuriously the right of others. These are general truths; but when clearly established rights are such as, if exercised, injury may result to others, then it must be considered whether or not their exercise be not restrained by the existence of some duty imposed. It does not always or necessarily follow that, because a party receives disadvantage from the exercise of right by another, therefore an action lies. In the case before us we see a railway company, with the conceded right to operate a railway, using engines propelled by steam generated by fire in so doing. There was also an adjoining proprietor with the right to his property, and to enjoy it unmolested and undisturbed. A part of

Kansas Pacific R. Co. v. Butts.

this property has been destroyed, and the immediate cause is the operating of the railway company's road. There is a loss. The road is the cause. The inquiry arises, by whose fault? The burden of proof is on the complaining party; the party whose property has been destroyed. Of this there is no question. The English courts have held that proof that the fire was communicated from the engine of the company is sufficient *prima facie* proof to throw upon the defendant the burden of showing that there was no want of skill, care, or diligence in the construction or management of the engines. *Piggot v. Eastern Counties R. Co.*, 54 *Eng. Com. Law*, 228. In this country the courts have with great unanimity, where the matter has not been regulated by statute, held that the mere fact that a fire is caused by a locomotive engine does not raise the presumption of negligence. In this case, we need not and do not propose to decide which is the better rule. The evidence is the agreed facts; and they show that the company had supplied its engine with all the most approved appliances in use for preventing injuries by the escape and communication of fire therefrom to property or combustible material upon or adjacent to the line of the railway, which was in good order, and was operated by competent and careful servants of the defendant. It also appears as a fact, that from engines of the same make and properly constructed and operated, burning coals and embers are sometimes blown by a high wind. It thus appears that no care or precaution that science or skill could provide was omitted in the construction of the engine to guard against such accidents as the one that occasioned the loss in this case; and any possible want of care or diligence on the part of the employees, as to this matter, is negatived by the facts. In such a state of facts is the railway company liable? It is not denied that the company was in the pursuit of its legitimate

Kansas Pacific R. Co. v. Butts.

business, pursuing it in exact conformity with its rights, and conducting it with scrupulous care and skill. If they are responsible for the loss, then it must be because they are insurers, and not because of any careless, unskillful, or improper use of their own property. This would be to apply to railway companies a liability never recognized as resting upon individuals, and we are referred to no case or principle which would make the company liable in this case. The books are full of cases holding the reverse; we refer to some of the most carefully considered. *Burroughs v. Housatonic R. Co.*, 15 *Conn.* 124; *Rood v. New York, &c. R. Co.*, 18 *Barb.* 80; *Griser v. Philadelphia, &c. R. Co.*, 8 *Pa. St.* 366; *Sheldon v. Hudson River R. R. Co.*, 14 *N. Y.* 218; *Smith v. Hannibal, &c. R. R. Co.*, 37 *Mo.* 287; *Illinois Central R. Co. v. Mills*, 42 *Ill.* 497; *Ohio, &c. R. Co. v. Shanefelt*, 47 *Ill.* 497; *Ryan v. New York Central R. R. Co.*, 35 *N. Y.* 210; *Indianapolis, &c. R. R. Co. v. Paramore*, 31 *Ind.* 143; *Pierce on Railways*, 313. The plaintiff in error was exercising in a reasonable manner and with great caution a lawful right, and in so doing an accident proceeding from his train caused the loss. For this the plaintiff in error cannot be held liable.

We have purposely omitted so far any consideration of how far the "standing grass and weeds upon the right of way, and scattered along and lying in the ditch beside the track of the railway" of the plaintiff in error of itself constitutes negligence. The company and adjoining owner both had upon their premises the same combustible material, and each contributed to the spread of the fire that occasioned the loss; and it is an almost universal fact, observable everywhere in our state, that the same combustible materials are found in almost every section of the state, the natural result of a rich soil, and uncropped growth. To hold the existence of such a condition of things negligence, would

Kellogg v. Chicago, &c. R. Co.

be to declare a liability for accidental fires, as between citizen and citizen, heretofore unknown to the law, and which we do not feel authorized to incorporate into our code. This very question was decided in Illinois in the cases of the Illinois Central R. R. Co. v. Mills, and the Ohio, &c. R. R. Co. v. Shanefelt, *supra*; and those decisions were but the enunciation of well-known principles applied to a given state of facts.

The judgment must be reversed, with directions to enter judgment on the facts for the defendant, the plaintiff in error in this court.

All concur.

BY THE COURT.—Judgment reversed, and judgment directed to be entered for the defendant.

KELLOGG v. THE CHICAGO & NORTH-
WESTERN RAILWAY COMPANY.

26 Wisconsin, 228.

Supreme Court of Wisconsin; June Term, 1870.

Negligence. Injury from fire. Allowing combustible material,—as dry grass and stubble,—to accumulate and remain upon and beside a railway track, liable to be set on fire by sparks and cinders thrown from passing locomotives, where there is nothing incombustible between the land of the railroad company and that of adjoining owners, to prevent the spread of fire, is a state of facts from which a jury may find negligence on the part of the railroad company, rendering the company liable to an adjoining proprietor whose property is destroyed by fire communicated to it in that manner.

Kellogg v. Chicago, &c. R. Co.

But the failure of such adjoining proprietor to remove the dry grass or stubble from his own land, in order to prevent the spread or communication of fire set by the negligence of the railway company is not such negligence on his part, contributing to the destruction of his own property, as will defeat his right to recover for the injury from the railway company.

The damages sustained by an adjoining proprietor, whose buildings and other property, situated at a distance from the line of a railway, are destroyed by fire communicated from an engine on the railway, to the grass and stubble on land of the railway, and thence by similar combustible material on his own land to the buildings and property destroyed, are proximate, not remote, within the meaning of the maxim, "*causa proxima, non remota, spectatur.*" The rule is not that the injury sustained must be the necessary or unavoidable result of the wrongful act, but that it shall be the natural and probable consequence of it, or likely to ensue from it. The destruction of property in the manner stated, is a result reasonably to be anticipated from the firing of the combustible material on the railway track ; and the omission to remove it may properly be considered, by the jury, negligence with respect to the property destroyed.

Appeal to the supreme court of Wisconsin from the circuit court of Rock county.

This was an action to recover damages from a railway company for the destruction by fire of hay in stacks, farm out-buildings, &c., belonging to the plaintiff, whose lands adjoined those of the defendant. The roadway of the company extended fifty feet on each side of the track, and this space had grown up and was filled with grass and stubble, become dry and combustible. The sparks from the company's engine set fire to this material. The season had been unusually dry ; at the time a strong wind in the direction of the plaintiff's land prevailed, to which the flames spread, causing the destruction of plaintiff's property. The remaining facts appear in the opinions rendered.

Upon the trial a verdict was found and judgment entered for the plaintiff; whereupon the defendant appealed.

Kellogg v. Chicago, &c. R. Co.

Pease & Ruger, for the appellant.

The statutes 6 Anne, ch. 31, § 6, and 14 Geo. III. ch. 78, § 86, provide that "no action, suit, or process, whatever, shall be had against any person, in whose house, chamber, stable, or barn, or on whose estate any fire shall, after 24th June, 1774, accidentally begin; nor shall any recompense be made," &c. *Lansing v. Stone*, 37 Barb. 18. This covers all fires not willfully set. 1 *Blucks. Com.* 431. The statutes cited exist as a part of the common law of Wisconsin, and in the absence of express statute, no action on the ground of the present can be maintained.

It does not appear from the evidence that the company was bound to keep its roadway free from grass and stubble, or that so doing was practicable. To require the company so to do would impose upon it a heavy burden, while the plaintiff might have averted the danger with little labor on his own land, and that the court held it to be his duty to do so. *Henry v. Railroad Co.*, 30 Vt. 638; *Norris v. Railroad Co.*, 28 Id. 99; *Hortzman v. Railroad Co.*, 18 B. Monr. 218.

The willows and stubble were allowed to grow by the company, as the usual, if not necessary protection for the embankment, and for such purpose the company had a right to preserve them. *Carson v. Railroad Co.*, 8 Gray, 423. And the question of its necessity should not have been left to the jury. *Brainard v. Clapp*, 10 Cush. 6.

The company had only a right of way over the one hundred feet adjoining plaintiff's land, and the latter was entitled to all vegetation growing upon it, save such as was necessary to the use of the railway. *Preston v. Railroad Co.*, 11 Iowa, 15; *Chapin v. Railroad Co.*, 39 N. H. 570; *Land's Appeal*, 55 Pa. St. 25, 26.

The plaintiff was guilty of contributory negligence in not removing stubble and grass from his own prem-

Kellogg v. Chicago, &c. R. Co.

ises adjoining the road, and in neglecting to plow up his land, or take other steps to avoid the consequence of fire in the lands of the company. 1 *Redf. Railways* 247, 254; *Ang. Highways*, 301, 303, 310. If the plaintiff and defendant had equal right to remove the growth, it became the duty of the former to do it as necessary to his protection from a danger legally and unavoidably incurred. *M. & W. R. R. v. McConnell*, 27 *Ga.* 481; *Carson v. Railroad Co.*, 8 *Gray*, 423; *Barry v. Lowell*, 8 *Allen*, 129; *Fitchburg Railroad Co. v. B. & M. R. R.*, 3 *Cush.* 88; *Cooley Const. Lim.* 384, 543.

The landowners along the line of a road cannot make exactly the same use, and leave in the same condition, lands immediately joining the railroad, as of those remote from it, without being guilty of negligence. They are aware of the increased hazard incurred by the presence of the road, and in consideration of the benefits conferred by it are bound to accept and guard against such damages as are necessarily created by it. *Ang. Carriers*, 489; *Babcock v. Railroad Co.*, 9 *Met.* 553; *Norris v. Railroad Co.*, 28 *Vt.* 99; *Hortsman v. Railroad Co.*, 18 *B. Monr.* 218; *Boothby v. Railroad Co.*, 51 *Me.* 318.

The damages are too remote for a recovery in this case. *Ryan v. Railroad Co.*, 35 *N. Y.* 210; *Hooksett v. Concord Railroad Co.*, 38 *N. H.* 242; *Henry v. Railroad Co.*, 30 *Vt.* 638; *Fitzsimmons v. Inglis*, 5 *Taunt.* 534; *Knight v. Wilcox*, 14 *N. Y.* 413; *Ashley v. Harrison*, 1 *Esp.* 48; *Ward v. Weeks*, 7 *Bing.* 211; *Loker v. Damon*, 17 *Pick.* 284; *Mott v. Railroad Co.*, 1 *Robt. (N. Y.)* 586, 593, and 594; *Bank v. Bank*, 17 *Mass.* 1-5, 29-32.

Williams & Sale, for the respondent.

The question of the negligence of the defendant was properly left for the jury. *Illinois Central Railroad v.*

Kellogg v. Chicago, &c. R. Co.

Mills, 42 *Ill.* 407; Bass v. Chicago, &c. Railroad Co., 28 *Id.* 18; Ohio, &c. R. R. Co. v. Shanefelt, 47 *Id.* 497.

The plaintiff cultivated his lands in the usual manner. There was no such accumulation in his lands as on that of the company. And the court below could not have instructed the jury that if they found defendant guilty of negligence, they must find the plaintiff so likewise.

The damage was the natural result of a fire kindled on the defendant's lands, under the circumstances, and was accordingly proximate and not remote. Thomas v. Winchester, 2 *Seld.* 408; Field v. Railroad Co., 32 *N. Y.* 339; Scott v. Shepherd, 2 *Wm. Blacks.* 893.

DIXON, Ch. J.—All the authorities agree that the presence of dry grass and other inflammable material upon the way of a railroad, suffered to remain there by the company without cause, is a fact from which the jury may find negligence against the company. The cases in Illinois cited and relied upon by counsel for the defendant hold this. They hold that it is proper evidence for the jury, who may find negligence from it, although it is not negligence *per se*. Railroad Co. v. Shanefelt, 47 *Ill.* 497; Illinois Central Railroad Co. v. Nunn, 51 *Id.* 78; Railroad Co. v. Mills, 42 *Id.* 407; Bass v. Railroad Co., 28 *Id.* 9. The court below ruled in the same way, and left it for the jury to say whether the suffering of the combustible material to accumulate upon the right of way and sides of the track, or the failure to remove the same, if the jury so found, was or was not, under the circumstances, negligence on the part of the company. No fault can be found with the instructions in this respect; and the next question is as to the charge of the court, and its refusal to charge, respecting the alleged negligence of the plaintiff contributing, as it is said, to the loss or damage complained

Kellogg v. Chicago, &c. R. Co.

of. This is the leading and most important question in the case. It is a question upon which there is some conflict of authority.

The facts were, that the plaintiff had permitted the weeds, grass, and stubble to remain upon his own land immediately adjoining the railway of the defendant. They were dry and combustible, the same as the weeds and grass upon the right of way, though less in quantity, because within the right of way no mowing had ever been done, and the growth was more luxuriant and heavy. The plaintiff had not cut and removed the grass and weeds from his own land, nor plowed in or removed the stubble, so as to prevent the spread of fire in case the same should be communicated to the dry grass and weeds upon the railroad, from the engines operated by the defendant. The grass, weeds, and stubble upon the plaintiff's land, together with the wind, which was blowing pretty strongly in that direction, served to carry the fire to the stacks, buildings, and other property of the plaintiff, which were destroyed by it, and which were situated some distance from the railroad. The fire originated within the line of the railroad, and near the track, upon the land of the defendant. It was communicated to the dry grass and other combustible material there, by coals of fire dropped from an engine of the defendant passing over the road. The evidence tends very clearly to establish these facts, and under the instructions the jury must have so found. The plaintiff is a farmer, and, in the particulars here in controversy, conducted his farming operations the same as other farmers throughout the country. It is not the custom anywhere for farmers to remove the grass or weeds from their waste lands, or to plow in or remove their stubble, in order to prevent the spread of fire originating from such causes.

Upon this question, as upon the others, the court

Kellogg v. Chicago, &c. R. Co.

charged the jury that it was for them to say whether the plaintiff was guilty of negligence, and, if they found he was, that then he could not recover. On the other hand, the defendant asked an instruction to the effect that it was negligence *per se* for the plaintiff to leave the grass, weeds, and stubble upon his own land, exposed to the fire which might be communicated to them from the burning grass and weeds on the defendant's right of way, and that for this reason there could be no recovery on the part of the plaintiff. The court refused to give the instruction, and, I think, rightly. The charge upon this point, as well as upon the other, was quite as favorable to the defendant as the law will permit, and even more so than some of the authorities will justify. The authorities upon this point are, as I have said, somewhat in conflict. The two cases first above cited from Illinois hold that it is negligence on the part of the adjoining land owner not to remove the dry grass and combustible material from his own land under such circumstances, and that he cannot recover damages where the loss is by fire thus communicated. Those decisions were by a divided court, by two only of the three judges composing it. They rest upon no satisfactory grounds, whilst the reasons found in the opinions of the dissenting judge are very strong to the contrary. Opposed to these are the unanimous decisions of the courts of New York, and of the English court of exchequer, upon the identical point. *Cook v. Champlain Transportation Co.*, 1 *Denio*, 91; *Vaughan v. Taff Vale Railway Co.*, 3 *Hurl. & Nor.* 743; *Same v. Same*, 5 *Id.* 679. These decisions, though made many years before the Illinois cases arose, are not referred to in them. The last was the same case on appeal in the exchequer chamber, where, although the judgment was reversed, it was upon another point. This one was not questioned, but was affirmed, as will be seen from the opinions of the judges, particularly of COCKBURN, Ch.

Kellogg v. Chicago, &c. R. Co.

J., and WILLES, J. The reasoning of those cases is, in my judgment, unanswerable. I do not see that I can add anything to it. They show that the doctrine of contributory negligence is wholly inapplicable—that no man is to be charged with negligence because he uses his own property or conducts his own affairs as other people do theirs, or because he does not change or abandon such use, and modify the management of his affairs, so as to accommodate himself to the negligent habits or gross misconduct of others, and in order that such others may escape the consequences of their own wrong, and continue in the practice of such negligence or misconduct. In other words, they show that no man is to be deprived of the free, ordinary, and proper use of his own property by reason of the negligent use which his neighbor may make of his. He is not his neighbor's guardian or keeper, and not to answer for his neglect. The case put by the court of New York, of the owner of a lot who builds upon it in close proximity to the shop of a smith, is an apt illustration. Or let us suppose that A and B are proprietors of adjoining lands. A has a dwelling house, barns, and other buildings upon his, and cultivates some portion of it. B has a planing mill, or other similar manufacturing establishment, upon his, near the line of A, operated by steam. B is a careless man, habitually so, and suffers shavings and other inflammable material to accumulate about his mills and up to the line of A, and so near to the fire in the mill that the same is liable at any time to be ignited. A knows this, and remonstrates with B, but B persists. Upon A's land, immediately adjoining the premises of B, it is unavoidable, in the ordinary course of husbandry, or of A's use of the land, that there should be at certain seasons of the year, unless A removes them, dry grass and stubble, which, when set fire to, will endanger his dwelling-house and other property of a combustible

Kellogg v. Chicago, &c. R. Co.

nature, especially with the wind blowing in a particular direction at the time. It may be a very considerable annual expense and trouble to A to remove them. It may require considerable time and labor, a useless expenditure to him, diverting his attention from other affairs and duties. The constant watching to guard against the carelessness and negligence of B is a great tax upon his time and patience. The question is: Does the law require this of him, lest, in some unguarded moment, the fire should break out, his property be destroyed, and he be remediless? If the law does so require, if it imposes on him the duty of guarding against B's negligence, and of seeing that no injury shall come from it, or, if it does come, that it shall be his fault and not B's, it is important to know upon what principle it is that the burden is thus shifted from B to himself. I know of no such principle, and doubt whether any court could be found deliberately to announce or affirm it. And yet such is the result of holding the doctrine of contributory negligence applicable to such a case. A is compelled, all his lifetime, at much expense and trouble, to watch and guard against the negligence of B, and to prevent any injuries arising from it, and for what? Simply that B may continue to indulge in such negligence at his pleasure. And he does so with impunity. The law affords no redress against him. If the property is destroyed, it is because of the combustible material on A's land, which carries the fire, and which is A's fault, and A is the loser. No loss can ever possibly overtake him. A is responsible for the negligence, but not he himself. He kindles the fire, and A stands guard over it. He sets the dangerous element in motion, and uses and operates it for his own benefit and advantage, negligently as he pleases, whilst A, with sleepless vigilance, sees to it that no damage is done. or if there is, that he will be the sufferer. This is the

Kellogg v. Chicago, &c. R. Co.

reductio ad absurdum of applying the doctrine of contributory negligence in such a case. And it is absurd, I care not by what court or where applied.

Now the case of a railroad company is like the case of an individual. Both stand on the same footing with respect to their rights and liabilities. Both are engaged in the pursuit of a lawful business, and are alike liable for damage or injury caused by their negligence in the prosecution of it. Fire is an agent of an exceedingly dangerous and unruly kind, and, though applied to a lawful purpose, the law requires the utmost care in the use of all reasonable and proper means to prevent damage to the property of third persons. This obligation of care, the want of which constitutes negligence according to the circumstances, is imposed upon the party who uses the fire, and not upon those persons whose property is exposed to danger by reason of the negligence of such party. Third persons are merely passive, and have the right to remain so, using and enjoying their own property as they will so far as responsibility for the negligence of the party setting the unruly and destructive agent in motion is concerned. If he is negligent, and damage ensues, it is his fault and cannot be theirs, unless they contribute to it by some unlawful or improper act. But the use of their own property as best suits their own convenience and purposes, or as other people use theirs, is not unlawful or improper. It is perfectly lawful and proper, and no blame can attach to them. He cannot, by his negligence, deprive them of such use, or say to them, "Do this or that with your property, or I will destroy it by the negligent and improper use of my fire." The fault, therefore, in both a legal and moral point of view, is with him, and it would be something strange should the law visit all the consequences of it upon them. The law does not do so, and it is an utter perversion of the maxim *sic utere tuo, etc.*,

Kellogg v. Chicago, &c. R. Co.

thus to apply it to the persons whose property is so destroyed by the negligence of another. It is changing it from "So use your own as not to injure another's property," to "So use your own that another shall not injure your property," by his carelessness and negligence. It would be a very great burden to lay upon all the farmers and proprietors of lands lying along our extensive lines of railway, were it to be held that they are bound to guard against the negligence of the companies in this way—that the law imposes this duty upon them. Always burdensome and difficult, it would, in numerous instances, be attended with great expense and trouble. Changes would have to be made in the mode of use and occupation, and sometimes the use abandoned, or at least all profitable use. Houses and buildings would have to be removed, and valuable timber cut down and destroyed. These are, in general, very combustible, especially at particular seasons of the year. The presence of these along or near the line of the railroad would be negligence in the farmer or proprietor. In the event of their destruction by the negligence of the company, he would be remediless. He must remove them, therefore, for his own safety. His only security consists in that. He must remove everything combustible from his own land in order that the company may leave all things combustible on its land and exposed without fear of loss or danger to the company to being ignited at any moment by the fires from its own engines. If this duty is imposed upon the farmers and other proprietors of adjoining lands, why not require them to go at once to the railroad and remove the dry grass and other inflammable material there? There is the origin of the mischief, and there the place to provide securities against it. It is vastly easier, by a few slight measures and a little precaution, to prevent the conflagration in the first place, than to stay its ravages when it has once begun,

 Kellogg v. Chicago, &c. R. Co.

particularly if the wind be blowing at the time, as it generally is upon our open prairies. With comparatively little trouble and expense upon the road itself, a little labor bestowed for that purpose, the mischief might be remedied. And this is an additional reason why the burden ought not to be shifted from the company upon the proprietor of the adjoining land; although, if it were otherwise, it certainly would not change what ought to be the clear rule of law upon the subject.

And the following cases will be found in strict harmony with those above cited, and strongly to sustain the principles there laid down, and for which I contend: *Martin v. Western Union R. R. Co.*, 23 *Wis.* 437; *Piggot v. Eastern Counties R. R. Co.*, 54 *E. C. L.* 228; *Smith v. London, &c. R. R. Co.*, *Law Rep.* 5 *C. P.* 98; *Vaughan v. Menlove*, 7 *Carr. & P.* 525; *Hewey v. Nourse*, 54 *Me.* 256; *Turberville v. Stampe*, 1 *Ld. Raym.* 264; *S. C.*, 1 *Salk.* 13; *Pantam v. Isham*, *Id.* 19; *Field v. New York Central R. R. Co.*, 32 *N. Y.* 339; *Bachelder v. Heagan*, 18 *Me.* 32; *Barnard v. Poor*, 21 *Pick.* 378; *Fero v. Buffalo, &c. R. R. Co.*, 22 *N. Y.* 209; *Fremantle v. London, &c. R. R. Co.*, 100 *Eng. Com. Law*, 88; *Hart v. Western R. R. Co.*, 13 *Metc.* 99; *Ingersoll v. Stockbridge, &c. R. R. Co.*, 8 *Allen*, 438; *Perley v. Eastern R. R. Co.*, 98 *Mass.* 414; *Hooksett v. Concord R. R. Co.*, 38 *N. H.* 242; *McCready v. Railroad Co.*, 2 *Strobh. Law*, 356; *Cleaveland v. Grand Trunk R. Co.*, 42 *Vt.* 449; 1 *Bl. Com.* 131; *Com. Dig., Action for Negligence*, A, 6.

It is true that some of these cases arose under statutes creating a liability on the part of railroad companies, but that does not affect the principle. Negligence in the plaintiff, contributing to the loss, is a defense to an action under the statutes, the same as to an action at common law. 8 *Allen*, 440; 6 *Id.* 87.

And the other objections against the liability of the

Kellogg v. Chicago, &c. R. Co.

company, that the fire set by its negligence was the *remote* and not the *proximate* cause of the injury done to the plaintiff, because his property consumed was situated from sixty-five to one hundred rods from the place where the fire started, and because there was a strong wind blowing in that direction at the time, are, in my opinion, equally untenable. The same objections were taken in several of the cases above cited, and overruled, and might have been taken in most of the others, if they had been considered legitimate grounds of defense. It would be strange indeed, if the liability of a party for the negligent destruction of property by fire were to depend upon the fact whether he set fire at once to the property, or whether he set fire to some other combustible material at some distance from it, but communicating with it, and which, it was apparent at the time, would inevitably, or almost inevitably, lead to its destruction. It was apparent in this case, almost as apparent and certain before the fire was set, that, if set at the time and under the circumstances, it *would* prove destructive of the property of the plaintiff or of others, as it was afterwards that it *had* so proved. It required no prophetic vision to see this. It was a matter within the common experience of mankind. There were the "natural and ordinary means" at hand by which it must prove so destructive. 13 *Metc.* 104. Those means extended directly and continuously from the place where the burning coals from the engine first touched the dry grass and weeds on the company's road, to the plaintiff's stacks, buildings, and other property. There were the dry grass, weeds, and stubble communicating with the property, and the wind blowing in the direction of it. And this condition of things had existed for some time, and had been suffered to exist by the company. No steps had been taken to remove the dry grass and other inflammable substances from the road,

Kellogg v. Chicago, &c. R. Co.

which, if they had been removed, would have prevented the injury. In this the company was at fault, and it was its sole fault, so far as can now be known, that the injury took place. It may be that the wind did not always blow, or in the same direction; but at that season of the year the times of calm were the exception. The wind was liable and likely to blow, and greatly to enhance the danger, at any time. The company, or its agents and employees, knew this, and were bound to increased care on that account. And the argument that because the wind blew at the time, or because the same negligence might not have produced the injury if the atmosphere had been calm, therefore, the company is not liable, is certainly a very odd way of reasoning upon such a subject. The argument is neither more nor less than this: that the greater the tendency and exposure to damage from negligence, the less the care and circumspection required by law to guard against or prevent such damage. In other words, that the obligation of diligence decreases in proportion as the necessity for its exercise increases. The company may neglect its duty, and set fires and destroy property, on a windy day or night, when the danger is increased, and it shall not be liable; whereas, if it do the same thing at a time when the wind is not blowing, and the danger is diminished, it shall be liable. It may be that this mode of reasoning merits the compliment of ingenuity in the endeavor to avoid the liability of a party for wrongs committed by him, but it clearly cannot be sound. The authorities all repudiate it, and it requires no effort of one's natural sense of reason and justice to do so. The winds and the dryness and combustibility of the substances upon the surface of the land are what create the danger, and impose upon the company the obligation of care and circumspection in the use and management of its fire. It is impossible to separate the idea of such obligation or duty from these

Kellogg v. Chicago, &c. R. Co.

natural causes or agencies from which it arises. If the materials on the surface of the earth never became dry and combustible, and the winds never blew, the obligation would never have existed. It springs from these natural causes and agencies, and is an obligation to guard against the evil effects produced by them, by the employment of such reasonable means and appliances as will prevent the escape or communication of the fire. To say, therefore, that the obligation ceases to exist, or that the party using the fire is justified in omitting the means or appliances to prevent its escape or communication, because of the presence of such natural causes or agencies, is to lose sight entirely of the ground upon which the obligation rests. The argument, if it proves anything, proves that there exists no obligation or duty at all in any such case. It disproves itself by proving too much.

But we are referred to the case of *Ryan v. New York Central R. R. Co.*, 35 *N. Y.* 210, and the recent one in the supreme court of Pennsylvania (*Pennsylvania R. R. Co. v. Kerr*, 4 *West. Jur.* 254; 62 *Pa. St.* 353; *S. C.*, 1 *Am. R.* 431), as having a bearing favorable to the company upon the questions here presented. The facts of those cases so entirely distinguish them from the present, that it seems hardly necessary to comment upon them. The point decided in each case was, that when fire is negligently communicated to one building, and it is destroyed, and subsequently another distinct and separate building is set fire to and destroyed by sparks from that, the negligent party is not liable in damages for the destruction of the latter building. In those cases the buildings were the property of different owners, and not contiguous to each other. In deciding them, the courts professed to act on the maxim *causa proxima non remota spectatur*; and in the last one the court say: "The maxim, however, is not to be controlled by time or distance, but by the succession.

Kellogg v. Chicago, &c. R. Co.

of events." The point was, that the burnings were distinct and separate, a series of events succeeding one another. In the present case there was but one burning, one continuous conflagration from the time the fire was set on the railroad until the plaintiff's property was destroyed. The combustible material extended and the ground was burned over, all the way from the railroad to the plaintiff's property ; and the fire, driven by the wind, was carried to his property in that manner. There was no distinct or separate setting fire to or burning of the stacks or buildings, and then a communication of the fire by sparks through the air from one stack or building to another. There was no succession of events, but only one event.

The facts of this case are altogether like those of the case of *Field v. New York Central R. R. Co.*, *supra*, which is referred to approvingly in *Ryan v. New York Central R. R. Co.* It was not the intention of the court therefore, in the latter case, to overrule the former, which, like the present, is clearly distinguishable.

But the doctrine of those cases has not received the unanimous assent of the courts. It is directly opposed by the decisions in Massachusetts and New Hampshire, above cited. In 98 *Mass.* 414, the case was where fire was set by a spark from an engine to grass near the track, and spread in a direct line, without any break, across land of several different proprietors, and a highway, to the woodland of the plaintiff, half a mile distant from the railroad, and burned large quantities of wood. It was held that the railroad company was responsible. In that case, the case of *Ryan v. New York Central R. R. Co.* was cited, and the court commented upon it as follows : " In that case a distinction is made between proximate and remote damages. The fire was communicated from defendant's locomotive to their woodshed, and thence, by sparks, one hundred

Kellogg v. Chicago, &c. R. Co.

and thirty feet, to the plaintiff's house ; and it was held that the plaintiff could not recover, because the injury was a remote and not a proximate consequence of the carelessness of the defendants in permitting their fire to escape. Our own cases, above referred to, are not noticed in the opinion. Nor does the opinion draw any line of distinction between what is proximate and what is remote ; and such a line is not obvious in that case. If, when the cinder escapes through the air, the effect which it produces upon the first combustible substance against which it strikes is proximate, the effect must continue to be proximate, as to everything which the fire consumes in its direct course. This is so, whether we regard the fire as a combination of the burning substances with the oxygen of the air, or look merely at its visible action and effect. As matter of fact, the injury to the plaintiff was as immediate and direct as an injury would have been which was caused by a bullet, fired from the train, passing over the intermediate lots, and wounding the plaintiff as he stood upon his own lot. It is as much so as pain and disability are proximate effects of an injury, though they occur at intervals, through successive years after the injury was received. Yet these are called proximate effects, though the actual effects of the injury may be greatly modified, in every case, by bodily constitution, habits of life, and accidental circumstances."

And it is worthy of remark, too, that in the Pennsylvania case, as well as the New York one, there is no reference to the Massachusetts decisions, nor to the English common law cases there cited.

The exception to the charge directing the jury to allow interest on the damages, is not urged here. It was held, in the case of *Chapman v. Chicago & North-Western Railway Co.*, just decided, that such direction was proper.

I am of opinion, therefore, upon the whole case,

Kellogg v. Chicago, &c. R. Co.

that there was no error of which the defendant can justly complain, and that the judgment should be affirmed.

COLE, J.—I concur with the chief justice that there was no error in the rulings of the court below.

PAINE, J.—Unless a railroad company is bound to keep its entire roadway free from grass or other matter naturally growing upon it, which, when dry, would be combustible and liable to ignite by sparks or coals from the engine, I think there was no evidence of negligence in this case upon which to submit the question to the jury. The legal question, therefore, is, whether such an obligation rests upon the company. Where the facts are undisputed, the question what amounts to negligence is one of law. And a court cannot in such a case, while declining to take the responsibility of saying that the facts show negligence, refer it to the jury and allow them to say so. That is allowing the jury to decide the legal question.

I think there is no material dispute as to the condition of the roadway at the spot where the fire was kindled. It was on a marsh, and there were some willows and high grass between the track and the line of the right of way. They had grown there naturally, and no combustible material had been placed there by any artificial means. And the only negligence was in not removing, by some means, this natural growth of grass and weeds and brush. I do not think, upon the facts here presented, that this was negligence. I will not deny that a case might be supposed where it would be negligence not to remove such combustible matter. But it would be a case where the obligation would grow out of the peculiar surroundings, and the fact of the practicability of such removal without extraordinary and disproportionate effort and expense. Thus, if

Kellogg v. Chicago, &c. R. Co.

there were valuable property in the immediate vicinity, which would naturally and probably be destroyed, if a fire should accidentally be kindled in such dry grass, and it was practicable to remove it so as to prevent that probability by reasonable effort and care, it might be negligence to suffer it to remain. But there were no such surrounding circumstances here. There was nothing to suggest the probability of a loss arising from a fire occurring at this spot any more than there would be at any spot along the road. The plaintiff's property that was destroyed was about a half a mile distant. To reach it, the fire had to run over about sixty-five rods of marsh that had been mowed by the plaintiff, crossing on its way a small brook ; and then run over stubble-fields the remainder of the distance. It was improbable that a fire, if kindled, would spread to such a distance over such ground. And it would doubtless not have done so, except for the unusual drouth and the occurrence of a very strong wind. I can therefore see no reason for submitting to the jury the question of negligence in leaving the dry grass in the roadway where this fire originated, unless it is negligence in law for a company to leave any dry and combustible material on any portion of its right of way. That such is the law, I cannot hold. It is true that, although an extreme drouth is not the ordinary condition of things, yet it sometimes occurs—although there is not generally a high wind blowing, yet there frequently is. And if the possible concurrence of these two events with a fire kindled on defendant's road without any negligence on its part, except leaving on the side of it the grass and weeds naturally growing there, made it negligence to leave them there, then it must be negligence for any railroad company to leave any combustible material anywhere on its right of way. Such a rule would be unreasonable. It would be so because it is impracticable to keep the line of a rail-

Kellogg v. Chicago, &c. R. Co.

way free from matter which, in a drouth, would be combustible, without an effort and expense that would be so great as to be intolerable. The ground on either side of the track to the line of the right of way is generally rough and broken, so as to make it impossible either to plow or to mow it in such a manner as to prevent the presence of dry grass and weeds. In marshes the surface is generally so uneven that it cannot be mowed closely enough to prevent leaving a considerable amount of grass, which, in a drouth, would be combustible. This the evidence of the plaintiff in this case clearly shows. He had mowed a large part of his marsh adjoining the spot where the fire originated, and yet he testifies that the fire ran more rapidly over that grass stubble than it did over his grain stubble. I do not believe, therefore, that it would be possible to keep the line of a railway free from combustible matter without the constant employment of a large force for that purpose, and in many places constantly digging up the surface of the ground by hand labor. Such an obligation would be disproportionately burdensome and oppressive. It would be much more reasonable, as has been done in some states, to pass a statute making the companies absolutely liable for all damages by fire originating from the engine within certain limits, and giving them an insurable interest in all property for which they would be liable.

Companies are justly and reasonably held to the use of great vigilance in the management of their engines, and to procure the most approved means for preventing accidents by fire. But after they have done this, to say that they must go so far as actually to keep their entire roadway free from dry grass, weeds, leaves, and other combustible matter, or else be held guilty of negligence, is, I think, unreasonable and extravagant. I cannot see why the same reasoning would not require them to build iron or stone fences and

Kellogg v. Chicago, &c. R. Co.

buildings along their road, because wooden fences and buildings are combustible, and, as everybody knows, are frequently set on fire. The answer to such a requirement is, that although fires sometimes happen in that way, yet they are the exception; and therefore, unless there are special circumstances suggesting an unusual necessity for such extreme caution, it is not negligence for the companies to use the ordinary fencing and building material. And the same answer is applicable to the grass and weeds growing on the road.

But if this is not so, if to leave them on the roadway constitutes negligence, necessarily, in the company, I am at a loss to see how the same facts cease to constitute negligence as soon as you pass the company's line, and get on to the line of the adjoining proprietor. Can it be negligence for the company to leave grass and weeds on its line, because if a fire should occur there it might run through the grass and weeds on the adjoining proprietor's land, and reach his buildings a half a mile distant, and yet no negligence at all for that proprietor, knowing all the facts, to leave the same kind of grass and weeds on his land, by means of which alone could the fire do him any serious damage?

I do not think, upon the facts here presented, there was sufficient ground for imputing any negligence to the plaintiff. On the contrary, the probability of damage in case a fire should occur at the spot where this originated, was so slight, that no negligence ought to be imputed to the company or the plaintiff. But they stand or fall together. The same reasoning that finds one guilty of negligence, necessarily convicts the other. They were both confessedly guilty of the same acts or omissions—that is, suffering dry grass and combustible matter to remain on their land in a dry time and in a strong wind. If, therefore, it was negligence in one, it was in the other. And as the facts were undisputed, the same rule which would hold the company

Kellogg v. Chicago, &c. R. Co.

guilty would prevent a recovery by the plaintiff, on the ground of contributory negligence, unless in such cases the general, well-established rule that contributory negligence of the plaintiff, producing the injury, prevents a recovery, is wholly inapplicable. That rule is uniformly applied in all cases of other injuries caused by railroad companies, and I know of no reason why it should not be equally applied here. Thus, it would hardly be maintained by any one that, in such a case, after the fire had started, the owner could stand idly by, with the means of preventing its spread, and, without using them, allow it to run across his fields and consume his buildings and other property, and then recover. It would clearly be a want of ordinary care and prudence to neglect then to use such means. Suppose this fire had occurred when there was no wind, and yet that it might have run across the plaintiff's stubble and reached his barn, unless he had taken the means to stop it. Suppose he could, by plowing a few furrows along the edge of his stubble field, have stopped it, and he had ample time to do so, would he not have been bound to do it? I think so, clearly, even though the fire had been caused by the actual negligence of the company in not using proper means to prevent its escape from the engine. And if this is so, it shows that the adjoining owner is not absolved from the general duty devolving upon every one to use ordinary care and prudence to avoid and prevent injury from the negligence of others. Where he is thus placed in the presence of a fire kindled by the negligence of the company, his obligation to use such reasonable means of prevention of damage as are within his reach, is clearly illustrated, and the fact of negligence, if he should neglect to use them, is very apparent. It is true that in such a case he could not be charged with negligence for not having resorted to means of prevention before the fire occurred, because he would not be bound

Kellogg v. Chicago, &c. R. Co.

to anticipate the negligence of the company in kindling the fire. Where such negligence consists in the improper construction or management of the engines, no one can foresee when or where the fire will occur. The owner, in such case, has nothing to put him upon his guard, so as to require any unusual precaution until it is actually kindled. But the same answer cannot be made here. Here there was no negligence in the management or construction of the engine. All the most approved means for preventing fires were used. The negligence consisted wholly in leaving combustible grass and weeds on the roadway in a dry time. This the plaintiff knew; he saw it. He had ample opportunities to take measures to guard against damage from it; but, instead of doing so, he was himself guilty of the same negligence by leaving the same combustible matter on his own land. It seems to me, therefore, that when it is once established that it is negligence for a company to leave dry grass and weeds on its roadway, and they are so left, and the fact is known to the adjoining owner, he is then in the same position as he would be if a fire had been kindled on or near his premises, in respect to his obligation to use reasonable care to avoid injury. He sees, in both cases, the negligence of the other party, and the danger to himself. And I know of no reasoning upon which he could be held bound to use such precautionary measures as ordinary care and prudence would suggest, to prevent injury to himself from such negligence in the one case, which would not be equally applicable to the other.

I do not believe that the owners of lands adjoining railways are bound to keep their lands clear from dry grass and weeds, or other combustible matter, under penalty of being chargeable with negligence. I do not hold that they are bound to discontinue the ordinary beneficial use of their property, even though such use might increase somewhat the hazard from fire. That

Kellogg v. Chicago, &c. R. Co.

was the principle of the decision in *Martin v. Western Union R. R. Co.*, 23 *Wis.* 437, in which I fully concurred. But it by no means follows that no act of such owners can be negligence, merely because it is such as they have a legal right to perform on their own lands. Thus, suppose such an owner, having plenty of room to stack his hay and grain elsewhere, should stack it all immediately adjoining the railway. Would it not be a plain act of negligence? It seems to me so, and that it cannot be said that such owners may invariably act as though no railroad was there, without being guilty of negligence. On the contrary, I think they furnish no exception to the general rule, that all persons are bound to use ordinary care to prevent injury from negligence of others. And so soon as it is established to be negligence in a railroad company to leave the dry grass and weeds upon its land, because, if a fire should occur, it might run across the adjoining owner's stubble-field, and reach his buildings, it follows necessarily that if plowing a narrow strip on those fields would prevent the loss, and he, after knowledge of the danger, neglects to plow it, he should be held guilty of a want of ordinary care. To say that he should have taken that precaution does not deprive him of the ordinary or beneficial use of his property. It does not impose upon him any burden or serious inconvenience. It is usual for farmers to plow their land in the fall. Plowing is an effectual preventive of the spread of fire. And it could hardly be matter of serious consequence to a farmer whether he plowed a strip sufficient for this purpose, at one time or another. To determine the degree of negligence in such cases, regard should be had to the facility and effectiveness of the means of prevention which the parties respectively possess. And I think it more clear that an owner, whose buildings are only endangered by reason of the liability of fire to run a half mile across his stubble-fields to reach them,

Kellogg v. Chicago, &c. R. Co.

is guilty of negligence if he neglects the simple precaution of plowing a strip sufficiently wide to prevent it, which he might do without any serious burden or inconvenience, than that the railroad company was negligent in not removing the entire dry grass and weeds upon its line, which, as already suggested, could only be done at so great expense as to make it really impracticable.

I think, therefore, upon the undisputed evidence in the case, if it was the duty of the court to submit to the jury the question of the defendant's negligence, it should have told them that it was their duty, if they found the defendant negligent, to have found that the plaintiff had also been guilty of such negligence as would prevent a recovery. And in these views I am fully supported by the late cases in Illinois, referred to in the opinion of the chief justice.

I think, also, that the damages were too remote to form the basis of a recovery. In holding this, I do not wish unnecessarily to adopt the conclusion of the late Pennsylvania and New York cases referred to in the opinion of the court. They hold that where one building is set on fire by negligence, and the fire is communicated from that to another, the burning of the latter is the remote and not the proximate consequence of the negligence, and therefore, there can be no recovery for it. Without examining the question elaborately, I will simply say that it seems to me, that where a fire is negligently kindled, the destruction of whatever is in such a situation as to burn by the mere force of the conflagration, without other intervening cause, is the direct and proximate consequence of the negligence. If this were not so, if fire should be negligently set to a long pile of wood or lumber, it might be said that only the sticks or boards first kindled were lost by the proximate consequences of the negligence, and that, as the fire passed from them to the others, the damage for

Kellogg v. Chicago, &c. R. Co.

the loss of all the rest would be remote. But where such a fire is kindled, and, by reason of some other intervening cause, it is carried or driven to objects which it would not otherwise have reached, the destruction of such objects would fairly seem to be a remote consequence of the negligence, and within the principle upon which the cases last referred to might be sustained, if their facts were such as to make it applicable. Thus, if a person should negligently set fire to a building in which powder was stored, and the explosion of the powder should throw fragments of the burning building to other buildings that would not otherwise have been reached, and set them on fire; or, if an unusual gale of wind should carry such fragments to a distance, with the same result, the damage for the loss of such other buildings might justly be said to be remote. This principle was clearly applicable here. It is evident that, except for the strong gale of wind, the fire would not have crossed the brook, and would not have reached the plaintiff's barn. While, therefore, it seems questionable whether the facts in those cases warranted the application of the principle, the facts in the present case do warrant it. And the principle itself furnishes an intelligible line of demarcation between those consequences of negligence in kindling fires for which the party is responsible, and those for which he is not.

I think the judgment should be reversed.

BY THE COURT.—Judgment affirmed.

The appellant moved for a rehearing.

Pease & Ruger, for the motion.

The company had a right to allow the grass and willows to grow along the roadway if, as shown in the evidence, it was necessary or convenient for the pro-

Kellogg v. Chicago, &c. R. Co.

tection of the road. *Carson v. Railway Co.*, 8 *Gray*, 423. And unless clearly unreasonable the company's judgment as to the use or necessity is conclusive. *Brainard v. Clapp*, 10 *Cush.* 6. That the plaintiff was bound to but failed to show that the existence of the vegetation along the way was unnecessary, or that its removal by the company was practicable or might reasonably have been required. In respect to the alleged negligence of the company, the true question was : Was it negligence as to the property actually destroyed, and not as to property lying next the road. *Barrow v. Eldridge*, 100 *Mass.* 460-1. And the test is, whether, under ordinary circumstances, the injury would have been the probable result of the alleged wrongful act. *McDonald v. Snelling*, 14 *Allen*, 294; *Ryan v. Railway Co.*, 35 *N. Y.* 210; *Calkins v. Barger*, 44 *Barb.* 424; *Fahn v. Reichart*, 8 *Wis.* 255; *Danills v. Potter*, 19 *E. C. L.* 375. A view of the liability of the company ignored in the instructions to the jury.

Injuries for which recovery can be had must be the proximate as well as the natural result of the negligence. *Sedg. on Dam.* 66; *Vedder v. Hildreth*, 2 *Wis.* 429; *Walker v. Ellis*, 1 *Sneed*, 515; *Donnell v. Jones*, 13 *Ala.* 490. And in determining this, the question is not whether there was a succession of events, but whether there were intervening causes between the act and the injury, beyond the control of defendant, and which it was not bound by exercise of ordinary prudence to foresee as the result or concomitant of its supposed negligence. *Scott v. Shepherd*, 2 *W. Blacks.* 893; *Vandenburgh v. Truax*, 4 *Denio*, 464; *Guille v. Swan*, 19 *Johns.* 381; *Shearman & R. on Neg.* 34; *Crain v. Petrie*, 6 *Hill*, 522-4; *McDonald v. Snelling*, 14 *Allen*, 294; *Field v. Railroad Co.*, 32 *N. Y.* 339; *Fero v. Railroad Co.*, 22 *N. Y.* 209.

There had been a period of unusual drought. There was a high wind blowing directly toward plaintiff's

Kellogg v. Chicago, &c. R. Co.

land, which was along the line of company's way covered with rank vegetation, under the circumstances sufficient to carry the flames across the stream. These are intervening causes over which defendant had no control and could not by exercise of ordinary foresight and prudence been bound to expect to come into conjunction with its alleged negligence and produce the injury. Therefore, the negligence, even if it subsisted, was only a remote cause.

The jury should not have been permitted to find the defendant guilty of negligence in permitting the vegetation to remain on its roadway, and the plaintiff not guilty of contributory negligence for allowing it to remain on his lands at the same time. *Railway Co. v. Shanefelt*, 47 Ill. 497; *Illinois Central R. R. Co. v. Frazier*, *Id.* 505; *Fero v. R. R. Co.*, 22 N. Y. 209; *Ross v. R. R. Co.*, 6 Allen, 87; *Smith v. R. R. Co.*, 37 Mo. 287; *Aldridge v. R. Co.*, 42 E. C. L. 276; *Root v. R. R. Co.*, 18 Barb. 80. Where the injury results from remote negligence of each party there can be no recovery. *Stucke v. R. R. Co.*, 9 Wis. 215; *Button v. R. R. Co.*, 18 N. Y. 254-260; *Pierce Am. R. R. Law*, 348-350; *Johnson v. R. R. Co.*, 20 N. Y. 74; *Tuff v. Warman*, 94 E. C. L. 585.

DIXON, Ch. J.—The argument in support of the motion for a rehearing is certainly most able and dignified, and brings out with the greatest clearness and force all that can well be said in opposition to the views expressed by the majority of the court. Courtesy and a sense of our own obligation require this statement. It is no small privilege, but one greatly to be esteemed, when, upon questions of this nature, which are comparatively new and as yet unsettled by many direct authorities, the court is required to trace its steps and verify the correctness of its conclusions, or to acknowledge its errors, in the light of such an argu-

Kellogg v. Chicago, &c. R. Co.

ment. And thus, though our views remain unchanged, our thanks are still due to counsel for the ability and learning they have displayed and the assistance they have rendered in the investigation and decision of the important questions involved in the action.

It is not the purpose of this opinion to re-examine, or again to discuss at any length, the questions which were considered in the former one. They were there so fully considered as to make this unnecessary and improper. A statement of the points adhered to, with some additional reasons, may be proper; and some consideration of those raised on the motion and now first pressed upon our attention, and of the authorities relied on, seems also to be required.

The position that there was negligence on the part of the railway company in not removing the dry grass and other combustible material from the track, or evidence tending strongly to show and from which the jury might find it, is still adhered to.

It was negligence of that continuous kind spoken of by the learned counsel as "consisting in the omission to perform a duty, whereby the happening of an event which may prove injurious is rendered possible," and which they frankly concede the authorities declare to be actionable, *provided* "the damages be such as would result from the event under *ordinary* circumstances," or such as are the *natural and proximate* consequence of the act or omission complained of. It was, therefore, present negligence, or negligence existing at the time of the injury, and by which it was produced, as much so as if at that time, or immediately before, the company had caused or permitted the dry grass and other inflammable substances to be placed upon the track, well knowing the dangerous tendencies of such act or permission, and the injurious consequences which might ensue to the property of others from the taking and communication of the fire. All the

Kellogg v. Chicago, &c. R. Co.

cases agree that the presence of such combustible material upon the track, where, with the utmost precautions to guard against the escape of sparks and burning coals from the engine, it is subject to and frequently does take fire, and where there is nothing incombustible upon the line of the company's road and between its land and the lands of adjoining proprietors to prevent the spread of fire or stay the mischief, is a circumstance from which the fact of negligence may be found by the jury. The company act with full knowledge of the peril, and knowingly assume the risk. In *Vaughan v. Taff Valley Railway Co.*, cited in the former opinion (3 *H. & N.* 743), the judge told the jury that he was prepared to decide that the defendants were liable, and he directed them, that if, to serve his own purposes, a man does a dangerous thing, whether he takes precautions or not, and mischief ensues, he must bear the consequences; that running engines which cast forth sparks is a thing intrinsically dangerous, and that if a railway engine is used which, in spite of the utmost care and skill on the part of the company and their servants, is dangerous, the owners must pay for any damage occasioned thereby. His lordship pointed out to them that by keeping the grass on the banks of the railway close cut, or by having the banks formed of gravel or sand so as to make a non-inflammable belt, all danger might be avoided; and he asked them whether they did not think there was inevitable negligence in the use of a dangerous thing calculated to do, and which did cause mischief. And this direction was sustained by the court in bank, on a rule to show cause why a new trial should not be granted, and approved on appeal to the exchequer chamber.

And the majority of the court also still adheres to the position that the failure of the plaintiff to remove the dry grass or stubble from his own land in order to prevent the spread or communication of fire set by the

Kellogg v. Chicago, &c. R. Co.

default or misconduct of the defendant, was not wrongful and improper on his part, not a culpable omission of duty by which he may be said to have co-operated in the destruction of his own property. We still think that the law imposed no such duty upon him. In the exercise of his lawful rights, every man has a right to act on the belief that every other person will perform his duty and obey the law ; and it is not negligence to assume that he is not exposed to a danger which can only come to him through a disregard of law on the part of some other person. *Jetter v. New York, &c. R. R. Co.*, 2 *Keyes*, 154 ; *Earhart v. Youngblood*, 27 *Pa. St.* 332. The rule of law on this subject, sustained by numerous authorities, is well stated in *Shearman and Redfield on Negligence*, § 31, as follows : " As there is a natural presumption that every one will act with due care, it cannot be imputed to the plaintiff as negligence that he did not anticipate culpable negligence on the part of the defendant. Nor even where the plaintiff sees that the defendant has been negligent, is he bound to anticipate all the perils to which he may *possibly* be exposed by such negligence, or even to refrain absolutely from pursuing his usual course on account of risks to which he is *probably* exposed by the defendant's fault. Some risks are taken by the most prudent men ; and the plaintiff is not debarred from recovery for his injury, if *he has adopted the course which most prudent men would take under similar circumstances*. And see particularly *Newson v. Railroad Co.*, 29 *N. Y.* 390 ; *Ernst v. Railroad Co.*, 35 *Id.* 28 ; *Railroad Co. v. Ogier*, 35 *Pa. St.* 60 ; *Clayards v. Dethick*, 12 *Q. B.* 439 ; and *Johnson v. Belden*, 2 *Lans.* 437. And in section 6, the same authors correctly observe that the law makes no unreasonable demands ; that no one is guilty of culpable negligence by reason of failing to take precautions which no other man would be likely to take under the

Kellogg v. Chicago, &c. R. Co.

same circumstances, even though, if he had used them, the injury would certainly have been avoided. In *Vaughan v. Taff Vale R. Co.*, last above cited, it appeared that in the plaintiff's wood adjoining the railway, "there was a great quantity of dry grass, of a highly inflammable nature. The wood had frequently been set on fire by sparks from the locomotives, and on four occasions the defendant had paid for the damage. In 1853 (the fire in question having occurred in 1856), the plaintiff wrote to the secretary of the company: 'No fire was known in the memory of man in the wood before the Aberdon railway was made; since it has been made, four or five times the wood has been ignited. Any one looking at it can easily satisfy himself that in a *dry season* the wood is *just about as safe a state as a barrel of gunpowder at Cyforthfa Rolling Mill.*' The plaintiff had taken no steps to clear away the accumulation of dry grass and fallen branches in the wood." Upon this evidence the judge refused to leave the question to the jury, "whether the plaintiff had not been guilty of negligence in permitting the wood to be in a combustible state by not properly clearing it," saying, that "he thought there was no duty on the part of the plaintiff to keep this wood in any particular state." This ruling was affirmed on the proceeding to show cause against a new trial, in the following language by BRAMWELL, B., delivering the judgment of the court: "It remains to notice another point made by the defendant. It was said that the plaintiff's land was covered with very combustible vegetation, and that he contributed to his own loss, and Mr. Lloyd very ingeniously likened the case to that of an overloaded barge swamped by a steamer. We are of opinion this objection fails. *The plaintiff used his land in the natural and proper way for the purposes for which it was fit. The defendant comes to it, he being passive, and does it mischief.* In the case of the overloaded

Kellogg v. Chicago, &c. R. Co.

barge, the owner uses it in an unnatural and improper way, and goes in search of the danger, having no right to impede another natural and proper way of using a public highway. We therefore think the direction was right, the verdict satisfactory, and the rule must be discharged."

The learned counsel strongly combat this position, and argue that, if logically carried out, the doctrine would utterly abrogate the rule that a party cannot recover damages where, by the exercise of ordinary care, he could have avoided the injury; and so, in the present case, after discovering the fire, the plaintiff might have leaned on his plow-handles and watched its progress, without effort to stay it, where such effort would have been effectual, and yet have been free from culpable negligence. The distinction is between a known, present, or immediate danger, arising from the negligence of another—that which is imminent and certain, unless the party does or omits to do some act by which it may be avoided, and a danger arising in like manner, but which is remote and possible or probable only, or contingent and uncertain, depending on the course of future events, such as the future conduct of the negligent party, and other as yet unknown and fortuitous circumstances. The difference is that between realization and anticipation. A man in his senses, in face of what has been aptly termed a "seen danger" (*Shear. & R.* § 34, note 1), that is, one which presently threatens and is known to him, is bound to realize it, and use all proper care and make all reasonable efforts to avoid it, and if he does not, it is his own fault; and he having thus contributed to his own loss or injury, no damage can be recovered from the other party, however negligent the latter may have been. But, in case of a danger of the other kind, one which is not "seen," but exists in anticipation merely, and where the injury may or may not accrue, but is prob-

Kellogg v. Chicago, &c. R. Co.

able or possible only from the continued culpable negligence of another, there the law imposes no such duty upon the person who is or may be so exposed, and he is not obliged to change his conduct or the mode of transacting his affairs, which are otherwise prudent and proper, in order to avoid such anticipated injuries or prevent the mischiefs which may happen through another's default and culpable want of care.

But the question chiefly discussed in the argument of counsel, and which may be said to be a new one, being now first presented, is, whether the damages sustained were the *natural and proximate* result of the negligence complained of, or whether the omission to remove the dry grass and vegetation from the railway track was negligence *with respect to the property of the plaintiff which was destroyed by the fire*. The questions whether the damages sustained were the natural and proximate result of the act or omission complained of, whether such act or omission constituted negligence with respect to the property injured, and whether the same was or was not the remote cause of the injury, within the maxim *causa remota non spectatur*, all depend upon the same considerations, and come to one and the same point of inquiry. They are different modes of stating the same proposition or subject of investigation. This question was incidentally alluded to in the former opinion in connection with two recent decisions, one in New York and the other in Pennsylvania. *Ryan v. New York Central R. R. Co.*, 35 *N. Y.* 210, and *Pennsylvania R. R. Co. v. Kerr*, 63 *Pa. St.* 363 (1 *Am. Rep.* 431). It is principally, if not altogether, upon the authority of those decisions that the point is now urged, that the damages were remote, and, therefore, not recoverable. It was thought sufficient on the former occasion, to distinguish those cases from the present with respect to the principle upon which they ob-

Kellogg v. Chicago, &c. R. Co.

viously proceeded, and which was expressly stated in the latter to be, that the maxim *causa proxima non remota spectatur* was "not to be controlled by time or distance, *but by the succession of events.*" Upon that principle, not conceding or denying its correctness, we thought the cases fairly distinguishable. Counsel arraign our views of those cases, and of the principle upon which they were decided, and say that "events intervening between the act complained of and the injurious consequence for which compensation is sought, are at the same time both causes and results; and the remark quoted refers to these events as causes and not as results. The damage caused by the burning of the second building was, in that case, held remote, not because it stood second in the order of results; but, as in the case of Ryan, for the reason that it was the result of an intervening cause, *not necessarily following the first.*" How far counsel may be correct in this, will appear from a perusal of the opinions. A careful examination of them by ourselves discovers no such qualification of the principle as that the burning of the second building must be a result *not necessarily following the burning of the first*, or, as expressed by counsel, "the result of an intervening cause *not necessarily following the first.*" The facts of both cases, and the entire reasoning of the judges, seem to us very clearly to show that such was not the view and understanding of the courts, but that the intention was to affirm, as a naked, unqualified principle of law, that for the burning of the second building which takes fire from the first, whether necessarily so or not, under ordinary circumstances, or under any circumstances, the party negligently setting fire to the first is not responsible; that for such second burning, as a mere second or succeeding event, without reference to its necessary connection with and dependence upon the first, the law imposes no liability upon the party neg-

Kellogg v. Chicago, &c. R. Co.

lignently causing the burning of the first. This we understand to be the doctrine of succession of events established by those decisions, and upon which it was held that the application of the maxim alone depended. Each burning, including the first, is the immediate cause of that which follows, and all are remote as to the wrong-doer, except the first or very building, structure, or thing to which he negligently applies the torch. The first fire causes the second, and the second the third, and so on, under all circumstances, and therefore, all after the first are not caused by the wrong-doer. He causes only the first, and for that only can be held responsible. To show that this is a correct exposition and true statement of the principle established, let us briefly examine the decisions. The facts in Kerr's case, as stated in the opinion, were as follows: "A warehouse of one Simpson, situate very near the track of the company's road, was set on fire by sparks emitted from a locomotive engine of the defendants, so negligently placed as to set it on fire. The burning of the warehouse communicated fire to a hotel building situated some thirty-nine feet from the warehouse, which, at the time, was occupied by the plaintiff as a tenant, and it was consumed with its furniture, stock of liquors, and provisions; and for this the plaintiff sued and recovered below. Several other disconnected buildings were burned at the same time, but this is in no way involved in the case." Such is a statement of the facts, and the entire facts upon which the court professed to adjudicate and to rely. We notice, in the first place, the statement that "the burning of the warehouse *communicated the fire to a hotel building* situated some thirty-nine feet," &c. Next we notice there is no allusion in the opinion, from first to last, to any other circumstance, ordinary or extraordinary, such as the blowing of the wind or dryness of the season, intervening at the time as a

Kellogg v. Chicago, &c. R. Co.

cause or event tending to increase the danger or to carry or communicate the fire to the hotel building. And, further, we observe that there is no language in the opinion expressing, and none implying, the qualification of fact or of principle, that the burning of the hotel building did *not necessarily follow* the burning of the warehouse, or was *not an ordinary and necessary* consequence thereof. On the contrary, from the facts as stated, the proximity of the buildings, and the reasons and illustrations given by the court, the inference very clearly is, that the burning of the hotel *was the ordinary, natural, and necessary* result of setting fire to and burning of the warehouse. The opinion says: "It is an occurrence undoubtedly frequent, that, by the careless use of matches, houses are set on fire. One adjoining is fired by the first, a third by the second, and so on, it might be for the length of a square or more. It is not in our experience that the first owner is liable to answer for all the consequences. And there is good reason for it. The second and third houses, in the case supposed, were not burned by the direct action of the match; and who knows how many agencies might have contributed to produce the result? Therefore, it would be illogical to hold the match chargeable as the cause of what it did not do, and might not have done." Now, what means this reasoning and illustration, if not intended to sustain the proposition immediately afterwards broadly laid down, that it is the succession of events which controls the application of the maxim? Why put, for the sake of illustration, the case of a building *adjoining* the building fired, and to which the fire would communicate itself *by the mere force of the conflagration*, without the aid of the atmosphere to float or the wind to blow the sparks and coals? Why say that the second and third houses, in the case supposed, were not burned by the direct action of the match, if it be not to limit the

Kellogg v. Chicago, &c. R. Co.

liability of the party negligently applying the match to pay for damage to that house alone as the first in the order of destruction, or in the series or succession of events, the burning of each owner's house being regarded as an event by itself? It is true, the question is asked, "and who knows how many agencies *might* have contributed to produce the result?" From this we imply that because some other agencies, known or unknown, natural or artificial, *may* have contributed, and, indeed, *must* have contributed to produce the result, therefore the person by whose wrong the fire was set and these agencies called into action must escape, and the innocent sufferer from that wrong go unrequited. The oxygen of the air combining with the burning substance is such an agency. It produces the fire, and the fire produces the loss or destruction of the building; but the efficient cause of both the fire and the loss is the wrong of the individual who sets the fire. We consider the rule, or the application of the maxim, as having been correctly stated by THOMAS, J., in *Marble v. Worcester*, 4 Gray, 412: "Having discovered an efficient, adequate cause, that is to be deemed the true cause, unless some new cause, not incidental to but independent of the first, shall be found to intervene between it and the result." And surely it would seem to us, the combination of the oxygen, the communication of the fire by the mere force of the burning to the adjoining buildings or to those so near to that first fired as that they would ordinarily be consumed, and the floating of the sparks and burning coals through the air, must, if new causes, be regarded as *merely incidental* to the first or efficient cause. They spring naturally and inevitably out of it, and cannot be regarded as *independent* of it. And so, too, in a country where winds generally prevail, and this motion of the air may almost be said to be its normal condition, so that sparks and coals of fire will float or

Kellogg v. Chicago, &c. R. Co.

be carried to a greater distance, and where seasons of dryness are frequent and ordinary, rendering all combustible things highly susceptible of ignition from contact with sparks and burning coals, must these not also, if regarded as causes, be considered such only as are incidental to the main, first cause? Do they not come in aid of it merely, rendering it the efficient agent of destruction? Certainly as independent causes they are powerless, and could not produce the mischief, and it is only as incidental to the first cause that they may be said to contribute in producing it. They are natural and ordinary conditions merely, by which that cause is made effective, and it seems hardly proper to speak of or regard them as causes in such connection.

And again, in the extract above made, what was intended by the conclusion that it would be illogical to hold the match chargeable as the cause of what it did not do, and might not have done, if not to hold that the negligent party is responsible for the first house burned, and not for any other, regardless of all other considerations? And does not the conclusion also show that if by the possible co-operation of any other agency, natural or artificial (not that some new and independent cause *must* be found), the second house is destroyed, the wrongdoer is not chargeable, merely because such destruction is a second or succeeding event, and for no other reason? We must confess our inability to put any other construction upon the language.

And furthermore, we can conceive of no more unmistakable evidence of the doctrine held by the court, and upon which the decision proceeded, than is found in that part of the opinion quoted by counsel in their argument, and which is as follows: "It cannot be denied but the plaintiff's property was destroyed, but by a secondary cause, namely, the burning of the warehouse. The sparks from the locomotive did not

Kellogg v. Chicago, &c. R. Co.

ignite the hotel. They fired the warehouse, and the warehouse fired the hotel. They were the remote cause—the cause of the cause of the hotel being burned. As there was an intermediate agent or cause of destruction, between the sparks and the destruction of the hotel, it is obvious that that was the proximate cause of its destruction, and the negligent emission of sparks the remote cause. To hold that the act of negligence which destroyed the warehouse, destroyed the hotel, is to disregard the order of sequences entirely, and would hold good if a row of buildings a mile long had been destroyed. The cause of the destruction of the last, in that case, would be no more remote, within the meaning of the maxim, than that of the first; and yet, how many concurring elements of destruction there might be in all of these houses, and no doubt would be, no one can tell. So to hold would confound all legitimate ideas of cause and effect, and really expunge from the law the maxim quoted, that teaches accountability for the natural and necessary consequences of a wrongful act, and which should, in reason, be only such that the wrongdoer may be presumed to have known would flow from his act.” Comment upon this language seems scarcely admissible for the purpose of making the meaning and intention of the court more clear, that it is “the order of sequences,” or, as previously stated in the opinion, “the succession of events,” which determines the application of the maxim. The sparks from the locomotive fired the warehouse, and the burning of the warehouse fired the hotel; and therefore the firing of the warehouse was not the cause of the firing of the hotel. This is the logic. It was the burning of the warehouse, and not the wrongful setting fire to it, which caused the destruction of the hotel, no matter how *naturally, necessarily, or inevitably even*, under any circumstances, the destruction of the latter may have followed from the wrongful act of firing the

Kellogg v. Chicago, &c. R. Co.

former. It is the order of sequences or succession of events which controls. The burning of each building, structure, or thing having a separate existence, use, name, or ownership, is an event by itself, and each event a cause by itself, which cause alone is to be considered as producing the next event or cause in the series, or as the proximate cause of it, regardless of the relation of one event to another, or of the necessary, natural, or inevitable dependence of any or all of them upon the first cause or wrongful act of the party to be charged. Courts and juries are precluded by the maxim, and must shut their eyes to the natural and ordinary relation of things, or of cause to effect, and looking only to spark or match must follow that, and, seeing what building or substance that ignited, must determine that the destruction of such building or substance alone was the result of the wrongful act. If there be other buildings or substances immediately connected with that to which the spark or match is applied, or so situated as that they must necessarily be and are consumed by the fire, they become and are intermediate agents or causes of their own destruction, and destroy themselves or each other. The building first fired is such an agent or cause with respect to that to which the fire is directly communicated from it. The warehouse was, in the language of the court, such "an intermediate agent or cause of destruction" with respect to the hotel. It was the warehouse that destroyed the hotel, and not the act of setting fire to the warehouse. It is true, that towards the close of the extract the court speak of accountability for the "natural and necessary consequences of a wrongful act;" but it is obvious they exclude and prevent such accountability by the interpretation given the maxim, and the definition of proximate and remote in the relation of causes to the effects produced—by arbitrarily establishing the rule, and holding that the burning of

Kellogg v. Chicago, &c. R. Co.

the first building is the only natural and necessary consequence of the wrongful act.

And if we turn to the case of Ryan, we shall find no material difference in the facts, nor in the reasoning or conclusion of the court. There is no allusion in it to any extraordinary circumstances existing at the time, contributing to the destruction of the plaintiff's house. It is not stated that the wind was blowing with unusual violence, nor that it was blowing at all, in the direction of the house, nor that the weather was dry. In the absence of any statement of either, as a circumstance affecting the case or influencing the judgment, it is fair to presume that neither existed. It is fair to presume, therefore, and must be presumed, that the burning of the house was the natural and probable consequence of the setting fire to and burning of the woodshed with the wood therein, under ordinary circumstances, or circumstances the most favorable to the defendant, such as a still day and no dryness of the shingles or materials of which the house was composed, so as to increase the danger. It is true, it is stated that the house was one hundred and thirty feet from the shed, but it is also stated that there was *a large quantity of wood* in the shed, and that the house *soon took fire from the heat and sparks*, and was entirely consumed, *notwithstanding diligent efforts were made to save it*; from which we infer that the destruction of the house by fire was naturally and necessarily involved in the burning of the shed with the large quantity of wood therein, under any circumstances. The opinion states the facts as follows: "On the 15th day of July, 1854, in the city of Syracuse, the defendant, by the careless management, or through the insufficient condition, of one of its engines, set fire to its woodshed and a large quantity of wood therein. The plaintiff's house, situated at a distance of one hundred and thirty feet from the shed, soon took fire from the heat and

Kellogg v. Chicago, &c. R. Co.

sparks, and was entirely consumed, notwithstanding diligent efforts were made to save it. A number of other houses were also burned by the spreading of the fire. The plaintiff brings this action to recover from the railroad company the value of his building thus destroyed." Forgetting the statute 6 Anne, ch. 31, § 6, and its effect upon the proposition as hereafter noticed, the court then immediately proceed to state the question to be considered, as follows: "A house in a populous city takes fire, through the negligence of the owner or his servant; the *flames extend to and destroy an adjacent building*. Is the owner of the first building liable to the second owner for the damage sustained by such burning?" It appears from this that the question to be decided was, as where the flames from the burning building, wrongfully fired, actually reach and necessarily and unavoidably consume another or an adjoining building, or where such other building is consumed by the mere force of the first conflagration. Next the court say: "It is a general principle that every person is liable for the consequences of his own acts. He is thus liable in damages for the proximate results of his own acts, but not for remote damages. It is not easy at all times to determine what are proximate and what are remote. In *Thomas v. Winchester*, 2 N. Y. 48, Judge RUGGLES defines the damages for which a party is liable, as those which are the natural and necessary consequences of his acts." Here follows an examination of some of the adjudged cases, and then these questions are put: "If, however, the fire communicates from the house of A. to that of B., and that is destroyed, is the negligent party liable for the loss? And if it spreads thence to the house of C., and thence to the house of D., and thence consecutively through the other houses, until it reaches and consumes the house of Z., is the party liable to pay the damages sustained by these twenty-four sufferers?"

Kellogg v. Chicago, &c. R. Co.

After this the opinion alludes to the possible difference between an intentional and a negligent firing, and to an English decision which is directly opposed to the conclusion arrived at by the court, and proceeds thus: "Without deciding upon the importance of this distinction, I prefer to place my opinion upon the ground that, in the one case, to wit, the destruction of buildings upon which the sparks were thrown by the negligent act of the party sought to be charged, the result was to have been anticipated the moment the fire was communicated to the building—that its destruction was the ordinary and natural result of its being fired. In the second, third, or twenty-fourth case as supposed, the destruction of the building was not a natural and expected result of the first firing. That a building upon which sparks and cinders fall should be destroyed or seriously injured must be expected, but that the fire should spread, and other buildings be consumed, is not a necessary or a usual result. That it is possible, *and that it is not unfrequent*, cannot be denied. The result, however, depends, not upon any necessity of a further communication of the fire, but upon a concurrence of accidental circumstances, such as the degree of heat, the state of the atmosphere, the condition and materials of the adjoining structures, and the direction of the wind. These are accidental and varying circumstances. The party has no control over them, and is not responsible for their effects. My own opinion, therefore, is, that this action cannot be sustained, for the reason that the damages incurred are not the immediate but the remote result of the negligence of the defendant. *The immediate result was the destruction of their own wood and sheds; beyond that it was remote.*"

We have thus given the facts, and all the reasoning of the court in support of the rule of law or principle attempted to be maintained by the decision. The resi-

Kellogg v. Chicago, &c. R. Co.

due of the opinion discusses some other cases upon the subject of negligence, including the leading one of *Scott v. Shepherd*, and calls attention to the disastrous consequences which must ensue to all wrongdoers and parties destroying the property of others by negligence, if any other rule than that adopted by the court were to be established. The foundation upon which the argument or conclusion rests, is the assertion, broadly made, that the burning of the second building, though the *frequent*, is not the natural and expected result of the firing of the first, and the fact that the party wrongfully setting the fire cannot control the degree of the heat, the state of the atmosphere, the condition and materials of the adjoining structures, and the direction of the wind. The heat generated by the fire which he has wrongfully kindled, is not within his control, and, therefore, he is not responsible for its effects. The fire once lighted and the heat in process of generation, he cannot stay such process or prevent the effects of the heat by any means or instrumentality within his power. He did not dictate the condition of the second building, nor the materials of which it should be constructed; and if the latter are combustible, and the former such that the building must take fire and be consumed, it is the unfortunate owner's fault, not his. Neither does he dictate the state of the atmosphere, nor the direction of the wind. These are the subjects of a higher power. He cannot rebuke the winds, or bid them cease or change their course, and if they carry the fire and waft destruction on their wings, it is not his fault. He may disregard all these circumstances, and wrongfully set the fire despite them if he will, knowing their existence and the results which they will surely produce, and yet shall be regarded faultless and innocent with respect to those results.

And as to the unqualified assertion that the burning of the second house is not the natural and expected

Kellogg v. Chicago, &c. R. Co.

result of the firing of the first, it seems to rest upon much the same basis of reason and regard for natural and physical truth, or for the relation of causes to their effects, as we find them constantly exhibiting themselves under the unvarying operations of universal natural laws. In the case supposed, though the flames of the burning of the first house "extend to and destroy" the second by their own mere force, yet it is declared the destruction of the second is "not a natural and expected result of the first firing."

We have been led to this careful examination of the foregoing cases by the criticism of counsel, that our remark in the former opinion, that "the point of the decisions was that the burnings were distinct and separate, a series of events succeeding one another," and therefore, the defendant was not liable, was unjust and unfounded. We must now leave it with the reader to say whether it was so or not. The learned counsel having, as we are constrained to think and to say, learned their law in a wiser and better school, felt called upon to rescue those courts from the imputation of having so decided, and thus we were to be visited with the consequences of having mistaken or misunderstood their decisions, although we quoted their own words. As already observed, we deemed it sufficient at that time to distinguish those cases from the present upon the ground upon which they obviously proceeded, and, although our views then were the same as now with regard to the correctness of the decisions, we thought it unnecessary to express them. Now, however, we have felt compelled to, and have freely done so; for it will appear from what has been said, that we do not at all accede to their correctness, notwithstanding the great consideration and respect so justly due to the judgments of the learned and able tribunals by which they were pronounced. And in these views we are happy to say, although he differed

from Justice COLE and myself in other particulars, that our late learned and lamented associate, Mr. Justice PAINE, now deceased, fully concurred. It will be observed that the cases are not referred to or relied upon in his opinion, and are inconsistent with it; and we know, as he frequently said, that he considered them illogical and unsound in making the order of events the criterion of liability, and in considering every result remote, except that first or immediately produced by the application of the fire. We accept now, therefore, as we did then, and regard as just and well founded, the remark of the present learned chief justice of Massachusetts, when he said of the Ryan case: "Nor does the opinion draw any line of distinction between what is proximate and what is remote; and such a line is not obvious in that case." And the same observation is equally and more just and true of the opinion in the case of Kerr. With all due respect, we must say it seems to us that the distinction, as well settled both on reason and authority, is utterly confounded and lost sight of in both. It has been often truly said, that hard cases make bad precedents; and we cannot but think that the supposed hardship of holding the negligent party responsible for all the legitimate consequences of his act, must have had its influence upon the mind of the court in each case. If a servant, driving his master's carriage in the street, negligently runs over and tramples a foot passenger, making him a cripple for life, the master must respond for the damages, be they never so much. If, by the same negligent act, the servant runs over, tramples and cripples two, three, twelve, or twenty-four, must the master not in like manner respond in damages for the injuries sustained by each one of them? Will it make any difference that the servant crippled A. first, then B., then C., and so on down to Z., if the crippling of all was the natural and necessary result of the same

Kellogg v. Chicago, &c. R. Co.

wrongful act? And will it make any difference also in such case, that the master may be overwhelmed in damages or involved in pecuniary ruin? It is quite immaterial to the last or any intermediate sufferer, whether he be the last, first, or any other in the order to receive injury; and it would seem a most inexplicable rule of law that should found a distinction upon this circumstance, and hold, because he was the last or any one after the first, he could not recover. Some one must suffer for injuries thus inflicted; and, as between the master and innocent third persons, the law has wisely fixed that, so far as pecuniary compensation will go, it shall be the master who employs, controls, and directs the servant.

Speaking of the liability of the master for damage done by the servant while actually employed in the master's service, BLACKSTONE says: "Upon this principle, by the common law, if a servant kept his master's fire negligently, so that his neighbor's house was burned down thereby, an action lay against the master; because his negligence happened in his service." 1 *Blacks. Com.* 431. But this rule was changed by statute 6 *Anne*, ch. 31, § 6, still in force, which ordains that no action shall be maintained against any in whose house or chamber any fire shall accidentally begin; for their own loss is sufficient punishment for their own or their servant's carelessness. *Ib.* That statute being in force in this country at the time of the revolution and since as part of our common law, sufficiently explains the absence of precedents for the recovery of damages in such cases; but, as it does not extend to any others, they are still governed by the rule of the common law unless expressly excepted by subsequent statutory enactment. See 1 *Cooley's Blacks. Com.* 431, note 19; *Bachelor v. Heagan*, 18 *Me.* 33; *Lansing v. Stone*, 37 *Barb.* 15; *Coburn v. Harvey*, 18 *Wis.* 147.

And if, in a case like that above supposed, the ser-

Kellogg v. Chicago, &c. R. Co.

vant negligently drives against and throws down one, and he in falling strikes against and throws down another, and that one a third, and so on, until twenty-four are prostrated, trampled, and injured, is the case any different, although all after the first might have escaped, but for the impulse wrongfully given to the first, which communicated itself through him to the second, and through the second to the third, and thus on to the last? The horses and carriage wrongfully driven against and prostrating the first, and passing thence on over, trampling and bruising all to the last, are the same means or instrument of injury first negligently set in motion. And so the fire first wrongfully applied to the house of A. is the same devouring element until it reaches and consumes the house of Z. Though fed on different substances, it is throughout its march of destruction the same means or instrument of injury first wrongfully set in motion. It may, with strict propriety of speech and of reason too, be said, that the fire which consumes the last house is the very same which was unlawfully applied to the first; and that it was applied to the last by the same unlawful act.

And if we consult the analogies of the criminal law, where it is obvious that the rule of the civil law should proceed as far and even go beyond it, we shall find the same principle prevails. "If A. have a malicious intent to burn the house of B., and in setting fire to it burn the house of C. also, or if the house of B. escapes by some accident, and the fire take in the house of C. and burn it, this shall be said in law to be malicious and willful burning of the house of C., though A. did not intend to burn that house. And accordingly it has been said, that if one man command another to burn the house of J. S., and he do so, *and the fire thereof burn another house*, the commander is accessory to the burning of such other house. So it has been held

Kellogg v. Chicago, &c. R. Co.

that if a person set fire to a stack, *the fire from which is LIKELY to communicate to a barn, and it does so*, he is, in point of law, indictable for setting fire to the barn." 2 *Russ. on Crimes*, 549. By parity of reasoning, if one negligently set fire to the house of A., or to his own house, the fire from which is *likely* to communicate to the house of B., and it does so, he should, in point of law, be liable for setting fire to the last house.

We remark, in passing, what has very recently fallen under our observation, that the supreme court of New York for the fourth judicial district, at general term, January, 1871, Judge JOHNSON delivering the opinion, in *Webb v. Rome, &c. R. R. Co.*, 3 *Lans.* 453, took the same view of the case of *Field v. New York Central R. R. Co.*, 32 *N. Y.* 339, which was taken by ourselves in the former opinion, and in the case before them, which was like it and like the present, followed that decision. The court observe that the case was cited in the opinion in the Ryan case and not overruled, and think the question should again be presented to the court of appeals. They also observe: "It is difficult to see, it must be admitted, how both decisions can stand, or if a distinction can be found, on what substantial ground of principle it can be placed." We concur in this observation, and also the following: "The question is also one of vast importance at this time, when an element so dangerous if carefully handled and used, is carried with such frequency and speed through the length and breadth of the land by a power itself generates in its passage, and under no control, except that of the parties for whose immediate benefit it is thus carried and used, or their servants. The principle is equally important to those who so use the element as a motive power, and to those who are liable to be injured by its escape along the path of its transit."

We also remark that it is said in the opinion in the case of Kerr, that in Smith v. London, &c. R. Co., *L. R. 5 C. P.* 98, the question whether the damages there recovered were proximate or remote, or whether the defendant was guilty of negligence with respect to the property of the plaintiff which was destroyed, was passed over *sub silentio*. We cannot so regard the case. On the contrary, we think that was the very point under discussion, and upon which the court divided. The facts of the case were, that workmen, employed by the company in cutting the grass and trimming the hedges bordering on the railway, placed the trimmings in heaps near the line, and allowed them to remain there fourteen days, during very hot weather in the month of August. Fire from a passing engine ignited one of these heaps and burned the hedge, and was thence carried by a high wind across a stubble-field and a public road, and burned the goods of the plaintiff in a cottage about two hundred yards distant from the railway. It was held by BOVILL, Ch. J., and KEATING, J. (BRETT, J., dissenting), that there was evidence to go to the jury of negligence on the part of the railway company, although there was no suggestion that the engine was improperly constructed or driven. BRETT, J., states the point of his dissent as follows: "But I am of opinion that no reasonable man could have foreseen that the fire would consume the hedge and pass across a stubble-field, and so get to the plaintiff's cottage at the distance of two hundred yards from the railway, crossing a road in its passage. It seems to me that no duty was cast upon the defendant, *in relation to the plaintiff's property*, because it was not shown that that property was of such a nature and so situate that the defendant ought to have known that by permitting the rummage and hedge trimmings to remain on the banks of the railway, they placed it under undue peril. . . . We read of such fires in the

Kellogg v. Chicago, &c. R. Co.

American prairies; but it would never occur, as it seems to me, to the mind of the most prudent person, that such an extraordinary conflagration could be caused in this country in the manner here spoken of by the witnesses." And KEATING, J., after recounting the facts, said: "I therefore think it may be fairly inferred that the fire broke out under circumstances which showed that the materials it fell upon were in a highly combustible state. The fire extended up the bank of the railway, through the hedge, and across a stubble-field, and so to the plaintiff's cottage. Undoubtedly at that time there seems to have been a very high wind: and that would give a force to the fire which under ordinary circumstances it would not have had. But that which presses upon my mind is, that it is impossible to say, that the accumulation of such materials at such a season of the year, and permitting them to remain there so long, was not some evidence of negligence. It was proved that the weather was unusually dry, and that fires were occurring all about the country, though it was not expressly stated that these were on the line. Under these circumstances, I cannot help thinking that the allowing the accumulation of such materials so near to where trains were constantly passing, was evidence of negligence." And BOVILL, Ch. J., said: "We must therefore look at all the circumstances occurring at the time of the accident, to see if there was anything upon which to found the charge of negligence. At the time this fire occurred, the weather was and had been for a considerable period unusually dry. The company's servants had been employed in cutting the grass and trimming the hedges at the sides of the line, and had heaped together the cuttings either for the purpose of burning or carrying them away, and had allowed them to remain in that state for about a fortnight. Under ordinary circumstances, it may be that hedges are not expected to ignite; but, if

Kellogg v. Chicago, &c. R. Co.

there be collections of grass and hedge trimmings near them in a very dry and inflammable condition, and these by some means become ignited, it may fairly be presumed that the hedges will be in danger; and who is to say where the danger will stop? It is said that no reasonable man could have supposed that, even if the fire did communicate to the hedge, it would run across a stubble-field and a public road, and so reach a building at the distance of two hundred yards from the railway. But seeing that the defendants were using dangerous machines; that they allowed the cuttings and trimmings to remain on the banks of their railway, in a season of unusual heat and dryness, and for a time which, under these circumstances, may fairly be called unreasonable, and that there was evidence from which it might reasonably be presumed that their engines caused the ignition of these combustible materials, and that the fire did in fact extend to the cottage, I think it impossible to say that there was not evidence from which a jury might be justified in concluding there was negligence *as regards the plaintiff*, and that the destruction of the cottage in which the plaintiff's goods were was the *natural consequence of their negligence*. What the defendant's servants ought, as reasonable men, to have contemplated as the result of leaving the accumulations of cuttings and trimmings where and as they did, must depend upon all the circumstances."

Rejecting, as we are compelled to, therefore, the authority of the New York and Pennsylvania decisions, we accept that of the remaining cases cited by counsel, and also the authority of the learned counsel themselves. We entirely agree with the learned counsel when they say, speaking of the New York and Pennsylvania decisions as interpreted by ourselves: "With all due respect, we submit that this is not the true rule for determining the application of the maxim. . . . That it is not the true rule is demonstrated by the indisputable

Kellogg v. Chicago, &c. R. Co.

fact that compensation may be recovered for any number of injurious results consecutively produced by impulsion, one upon another, and constituting distinct and separate events; provided they all necessarily follow the negligence or wrongful act constituting the first cause. . . . This is the distinguishing feature, upon which the damages have been held sufficiently proximate in many cases where, at first glance, they appear quite remote." This we regard as an undoubtedly correct statement of the law, and one which is upheld by all the authorities save the two cases last referred to, which, as it seems to us, are in direct opposition to all others. This statement was made on the authority of the two cases of *McDonald v. Snelling*, 14 *Allen*, 290, and *Barron v. Eldredge*, 100 *Mass.* 455, cited by counsel. The law upon the subject is laid down with great accuracy and precision in the former and numerous cases referred to. The court say: "Where a duty or right is created wholly by contract, it can only be enforced between the contracting parties. But where the defendant has violated a duty imposed upon him by the common law, it seems just and reasonable that he should be held liable to every person injured, whose injury is the natural and probable consequence of the misconduct. In our opinion, this is the well-established and ancient doctrine of the common law, and such a liability extends to consequential injuries, by whomsoever sustained, so long as they are of a character likely to follow, and which might reasonably have been anticipated as the natural and probable result under ordinary circumstances of the wrongful act. The damage is too remote if, according to the usual experience of mankind, the result was not to be expected. This is not an impracticable or unlimited sphere of accountability, extending indefinitely to all possible contingent consequences. An action can be maintained only where there is shown to be, first, a mis-

Kellogg v. Chicago, &c. R. Co.

feasance or negligence in some particular as to which there was a duty towards the party injured, or the community generally; and, secondly, where it is apparent that the harm to the person or property of another, which has actually ensued, was reasonably likely to ensue from the act or omission complained of." And again: "It is clear from numerous authorities, that the mere circumstance that there have intervened, between the wrongful cause and the injurious consequence, acts produced by the volition of animals or of human beings, does not necessarily make the result so remote that no action can be maintained. The test is to be found, not in the number of intervening events or agents, but in their character, and in the natural and probable connection between the wrong done and the injurious consequence. So long as it affirmatively appears that the mischief is attributable to the negligence as a result which might reasonably have been seen as probable, the liability continues."

The facts in that case were, that by the careless driving of his servant, the defendant's sled was caused to strike against the sleigh of one Baker, with such violence as to break it in pieces, throwing Baker out, frightening his horse, and causing the animal to escape from the control of its driver, and to run violently along Tremont street, round a corner, near by, into Elliott street, where he ran over the plaintiff and his sleigh, breaking that in pieces and dashing him to the ground. The court say: "Upon this statement, indisputably the defendant would be liable for the injuries received by Baker and his horse and sleigh. Why is he not responsible for the mischief done by Baker's horse in his flight? If he had struck that animal with a whip, and so made it run away, would he not be liable for an injury like the present? By the fault and direct agency of his servant, the defendant started the horse in uncontrollable flight through the streets,

Kellogg v. Chicago, &c. R. Co.

As a natural consequence, it was obviously probable that the animal might run over and injure persons traveling in the vicinity. Every one can plainly see that the accident to the plaintiff was one very likely to ensue from the careless act. We are not, therefore, dealing with remote or unexpected consequences, not easily foreseen nor ordinarily likely to occur, and the plaintiff's case falls clearly within the rule already stated as to the liability of one guilty of negligence for the consequential damages resulting therefrom."

And the court proceed to say, that the views thus expressed are fortified by numerous decisions, to a few of which it may be expedient to refer. And they refer to the case of *Barnes v. Chapin*, 4 *Allen*, 444, where it was held that when a horse was turned loose on the highway, and there kicked a colt running by the side of its dam, the owner of the horse was liable for that damage. And also to *Powell v. Deveney*, 3 *Cush.* 300, where the defendant's servant left a truck standing beside a sidewalk in a public street, with the shafts shored up by a plank in the usual way. Another truckman temporarily left his loaded truck directly opposite on the other side of the street, after which a third truckman tried to drive his truck between the two others. In attempting to do so with due care, he hit the defendant's truck in such a manner as to whirl its shafts around on the sidewalk so that they struck the plaintiff, who was walking by, and broke her leg. For this injury she was allowed to maintain her action, the only fault imputable to the defendant being the careless position in which the truck was left by his servant on the street, which was treated as the sole cause of the breaking of the plaintiff's leg, and in legal contemplation sufficiently proximate to render the defendant responsible. These are followed by several other citations.

Now it seems needless, after what has been said, to

Kellogg v. Chicago, &c. R. Co.

point out the inconsistency between the two decisions of which we have been speaking, and the principles thus laid down, and the cases in which they have been applied, which are to be found in all the books. The conflict is manifest; and it is equally manifest, if those two decisions are to be regarded as correct in principle and good law, that hundreds, and it might perhaps with truth be affirmed, thousands of cases, both in England and this country, are unsound and must be overruled. We cannot so regard them. We cannot agree with the court of appeals that the burning of the second and other houses in the case supposed, or of the plaintiff's house in the case before the court, was not the *natural* and probable consequence, or the consequence *likely* to follow from the wrongful act complained of, under ordinary circumstances. It will be observed that the rule as we find it laid down, and as we believe it to be, is *not* that the injury sustained *must* be the *necessary* or unavoidable result of the wrongful act, but that it shall be the *natural and probable* consequence of it, or one likely to ensue from it. We have endeavored to show in the case supposed, and in that before the court, that it was the necessary or almost unavoidable result. The court admit that it is not *unfrequent*. By this we understand,—often to be met with—often repeated or occurring—not a particular accident, but one of the habitual incidents of setting fire to one of several houses or buildings so situated. Is it not then a natural and probable consequence, one likely to follow from the burning of the first? And may not such result be reasonably anticipated or expected according to the usual experience of mankind? If the running over a person in the street by a frightened horse which has escaped from the control of its driver, is, according to common experience, a result reasonably to be expected from the breaking away and flight of the horse, or if breaking the leg of

Kellogg v. Chicago, &c. R. Co.

a pedestrian by the shafts of a truck which are improperly shored up in the street, and which truck is hit by the truck of a third person, causing the shafts to whirl round and strike the leg, be a result reasonably to be expected from such improper shoring, then much more should we say that the burning of the second, third, and other houses in the case supposed, was a result reasonably to have been expected from the firing of the first. A slight knowledge of the nature, laws, and force of fire would seem to demonstrate this.

And the position of the court of Pennsylvania, by the rule laid down as to what is a proximate and what a remote cause, and which cuts off all liability and all remedy for consequential injuries of every name and nature in actions for torts and wrongs, seems to us still more objectionable. Upon the doctrine of that court, the escape of the horse caused by the careless driving of the defendant's servant, had in point of law no connection with the injury subsequently inflicted upon the plaintiff. It was the remote cause. It was the running of the horse after its escape from the driver's control, which occasioned the injury, and that was the proximate cause, not produced by the carelessness of the servant and not rendering his master responsible. And so, too, in the case of the broken leg, it was the driving by the third truckman against the truck, even though he used due care, which caused the injury, unless the court would go still farther and consider the hitting of the truck one event and the whirling of the shafts another. And the strange misapplication of the maxim and of the case supposed by Professor PARSONS, quoted at the outset of the opinion, of a debtor who fails to meet his engagement with his creditor, by reason of which the creditor fails to meet his, and is thrown into bankruptcy and ruined, is well illustrated by two cases cited and the comments upon them in the

Kellogg v. Chicago, &c. R. Co.

opinion above referred to, of the supreme court of Massachusetts. The court say: "Two recent cases, both much considered, sound and consistent with each other, well illustrate the true rule of law. A druggist who carelessly labeled belladonna, a deadly poison, as extract of dandelion, a harmless medicine, and sent it so labeled into the market, was held, by the court of appeals of New York, liable in damages, after it had passed through several intervening hands, had been purchased by an apothecary, and administered by the plaintiff to his wife, who was injured by using it as a medicine in consequence of the false label. *Thomas v. Winchester*, 6 *N. Y.* 397. Here the dealer owed to the public a duty not to expose human life to danger by falsely labeling a noxious drug and selling it in the market as a harmless article. To do so was culpable and actionable negligence towards all likely to be and who in fact were injured by the mistake. And the injury that did follow was the naturally and easily foreseen result of the carelessness.

"On the other hand, where one article, black oxide of manganese, in itself harmless, which became dangerous only by being combined with another, was sold by mistake, the plaintiff, who purchased it of a third party and mixed it with another substance, the combination with which caused a dangerous explosion, was held by this court to have no right of action against the original vendor who made the mistake, for the damages caused by the explosion. *Davidson v. Nichols*, 11 *Allen*, 514. The mistake in regard to an article in its own nature ordinarily harmless, in the absence of contract or false representation, was not a violation of any public duty, or negligence of such a wrongful and illegal character as to render the party who made it liable for its consequences to third persons. Nor was it a natural and probable consequence of such a mistake that this ordinarily innocuous sub-

Kellogg v. Chicago, &c. R. Co.

stance would be mixed with another chemical agent, become explosive by the combination, and a third party be thereby injured."

The case of a debtor who fails to meet his engagement is not one of tort or wrong in any legal sense. The bankruptcy and ruin of the creditor by reason of such failure is not a result likely to ensue, a natural and probable one, from the fact of such failure. Ordinarily it produces no such result, and is not, therefore, reasonably to be expected by the debtor. In rare and exceptional cases it may do so, but then only by connection or alliance with other circumstances not necessarily known to the debtor and of which he is in general ignorant and without the means of knowledge. The embarrassment of the creditor, the extent of his engagements, his inability to meet them, and all other circumstances which produce his bankruptcy and ruin, are facts usually known only to himself, and with reference to which no general engagement of the debtor to pay at a particular time can be presumed to have been made. And the decision in *Insurance Co. v. Tweed*, 7 Wall. (U. S.) 44, referred to by the same court, also very clearly sustains our views. Discussing the doctrine of proximate and remote causes as it has arisen and been decided by the courts in a great variety of cases, the opinion says: "One of the most reliable of the *criteria* furnished us by these authorities, is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened, *of itself sufficient* to stand as the cause of the misfortune, the other must be considered as too remote.

"In the present case we think there is no such new cause. The explosion undoubtedly produced or set in operation the fire which burned the plaintiff's cotton. *The fact that it was carried to the cotton by first burning another building, supplies no new force*

Kellogg v. Chicago, &c. R. Co.

or power which caused the burning. Nor can the accidental circumstance that the wind was blowing in a direction to favor the progress of fire towards the warehouse, be considered as a new cause. That may have been the usual course of the breeze in that neighborhood."

Another position taken by the learned counsel is, that the dryness of the weather and the blowing of the wind at the time the fire was set, were not *ordinary*, but *extraordinary* circumstances, within the meaning of the rule above stated. That which is frequent or oft repeated, occurring year by year with almost unvarying regularity, like periods of drouth at certain times and seasons, or like the almost daily blowing of winds in our country, cannot be regarded as extraordinary. These are ordinary circumstances in the completest sense of the word, and just such as persons engaged in a dangerous business the mischiefs of which may be thereby enhanced, are bound by the rule to foresee, and by increased care and vigilance to guard against.

Another and the last position of counsel which we notice is, that it was error in the court not to have instructed the jury that they must find negligence on the part of the defendant *with respect to the property destroyed*. The question was not so put by the jury, but by a general instruction that they must find that the negligence of the defendant produced the loss and injury for which a recovery was sought. The question whether there was negligence in relation to the property destroyed, is undoubtedly one of fact for the jury, unless there is a total want of evidence tending to sustain that conclusion. It appears, however, from what has already been said, that in our judgment there was abundance of such evidence from which the jury must have so found the fact, had the point been thus submitted to them. Granting, therefore, that the instructions were defective in this particular, it would

Kellogg v. Chicago, &c. R. Co.

still seem to follow that the judgment ought not to be reversed. It is a settled rule that this court will not reverse for errors in the instructions or rulings of the court below, where it is clear that the verdict and judgment could not have been different on the evidence. *Andrea v. Thatcher*, 24 *Wis.* 471; *Ketchum v. Zeilsdorff*, 26 *Id.* 514. But there is another rule of practice, also well settled, which would forbid such reversal. The general charge of the court, or instructions given, were clearly correct, embracing all the points necessary for the full understanding of the jury, except this particular one. In such case the rule is, that if a party desires to have the jury instructed upon a particular point, not embraced in the charge given by the court, or if an instruction or conclusion of law merely requires modification in some particular or particulars, not materially affecting its general correctness, an exception thereto should be particular, so as to call the attention of the court to the precise point of objection. *Browers v. Merrill*, 3 *Chand.* 46; *Lachner v. Salomon*, 9 *Wis.* 129; *Knox v. Webster*, 18 *Id.* 406; *Weisenburg v. City of Appleton*, 26 *Wis.* 56; *Northwestern Iron Co. v. Aetna Ins. Co.*, *Id.* 78. In this case there was only a general exception, which was insufficient. Had the attention of the court been called to the point now urged, the instructions would unquestionably have been so modified. It is a fact appearing from the argument of the case in this court, that the point is raised for the first time upon this application and argument for a rehearing.

The rehearing must be denied.

BY THE COURT.—Rehearing denied.

INDEX.

ACCEPTANCE.

As to effect of acceptance of goods to be delivered beyond terminus of railway, see **CARRIERS**, 13, 16, 21, 24.

As to effect of acceptance of bill of lading without objection, see **CARRIERS**, 15.

ACTION.

As to the jurisdiction of actions against a railway company incorporated by and operating its road in more than one state, see **JURISDICTION**.

As to right of action for injury to animal taken up as estray, see **CATTLE**, 1.

As to right of action for causing death of infant child, see **DAMAGES**, 1.

AGENCY.

As to when the consignor is agent of the consignee to ship goods, see **CARRIERS**, 10-12.

As to when a carrier is agent of the consignee to receive goods, see **CARRIERS**, 21.

As to execution by agent of agreement to secure right of way, see **LANDS**, 11.

AGREEMENTS.

See **CONTRACTS**.

APPEAL.

1 The discretion of a jury to judge of the credibility of witnesses is not arbitrary; they must exercise their discretion,—not their will, merely. In this respect the action of a jury may be reviewed by an appellate court. *Chicago, Burlington & Quincy R. R. Co. v. Stumps*, 885.

2. When the facts are agreed, what constitutes negligence is a question of law, and an appellate court can determine what is

APPEAL—Continued.

shown in the facts as readily and as fully as the court from which the appeal is taken. *Kansas Pacific R. R. Co. v. Butts*, 477.

ASSESSMENT.

As to the mode of assessing damages for property taken for or injured by the construction of a railroad, see **LANDS**, 1-17; **LEASES**, 2.

As to assessment of taxes upon railroad stock, earnings, and property, see **TAXES**, 5-11

BILLS OF LADING.

1. A bill of lading, stipulating that a railroad assumes no other responsibility as to the property shipped, than such as may be incurred upon its own road, if accepted by the shipper, in the absence of fraud or mistake, discharges the railroad from liability for a loss sustained beyond its terminus. *Mulligan v. Illinois Central R. R. Co.*, 322.
2. As a bill of lading is signed by one party only, the evidence of assent to its terms by the other party is usually his accepting and acting upon it. And his acceptance without objection is conclusive of his assent, where it does not appear that any fraud or imposition was practiced, or that any mistake intervened. *Id.*

BONDS.

The ordinance of the convention of North Carolina of 1865,—that all executory contracts, solvable in money, made between certain dates, shall be deemed to have been made with the understanding that they were solvable in money of the value of Confederate currency, according to a scale to be fixed by the legislature, subject to evidence of a different intent by the parties,—applies to bonds for the payment of money executed by a railway company within the dates specified. And a different intent cannot be implied, in the absence of all other evidence, merely from a provision of the charter of the company that its bonds shall be paid to contractors for building the road only at par value. *Alexander v. Atlantic, Tennessee, & Ohio R. R. Co.*, 181.

As to the power of municipal corporations to issue bonds in aid of railroads, see **MUNICIPAL CORPORATIONS**, 4, 5.

As to the custody of bonds of a state issued to railway company, see **OFFICERS**, 2, 3.

BURDEN OF PROOF.

As to the burden of proof of negligence, see NEGLIGENCE, 10.

CARRIERS.

1. The legislature of a state has power to pass an act to prevent unjust discriminations in the rates of charges for freight by railways, either as between individuals or communities, and to enforce its observance by appropriate penalties. *Chicago & Alton R. R. Co. v. People*, 242.
2. Such an act does not impair the contract between the state and a railway company, constituted by the charter of the corporation. The well-settled rule of the common law, that common carriers shall not make unjust and injurious discriminations in their rates, applies to natural and artificial parties alike, by virtue of their function as common carriers, the moment they commence the transportation of freight; and railway companies must be deemed to accept their charters subject to this implied limitation. *Ib.*
3. But an act which prohibits not merely unjust discriminations, but discriminations of any character, and which imposes as a penalty a forfeiture of the franchises of any railway company making any discrimination in its rates, violates the constitution of Illinois, which empowers the general assembly to pass laws to prevent unjust discrimination, and to enforce such laws by adequate penalties. *Ib.*
4. At common law, a common carrier is bound, in the performance of his public service of transportation, not to make any unreasonable discrimination against any person in respect to terms, facilities, or accommodations; and a common carrier making such unreasonable discrimination is liable for the damage caused thereby. *McDuffee v. Portland & Rochester Railroad*, 261.
5. The provisions of N. H. Gen. Stat. ch. 149, § 2, upon this subject, are merely declaratory of the common law. *Ib.*
6. The act incorporating a company conferred upon it the power to fix, regulate, and receive charges for the transportation of passengers, not exceeding certain specified rates. A subsequent general railroad law enacted that "all existing railroad corporations within this State shall respectively have and possess all the powers and privileges contained in this act; and they shall be subject to all the duties, liabilities, and provisions not inconsistent with the provisions of their charters, contained in" certain sections specified. Corporations formed under the general law were allowed to regulate and receive fares within a higher limit than that fixed by the charter mentioned. *Held*, that this

CARRIERS—Continued.

corporation could also fix and receive fares within the higher limit without regard to the restriction of its charter. This was among the "powers and privileges" which were absolutely conferred. The words in the general act "not inconsistent with the provisions of their charters," could not be applied to the grant of powers and privileges. *Johnson v. Hudson River R. R. Co.*, 285.

7. An injunction should not be granted to restrain the transportation by a railroad of the property of individuals, because the railroad company has failed to make the payments stipulated in a contract entered into by such company for the use of another road in carrying passengers and goods. The interest of the public in the use and continued operation of railroads forbids the courts to afford such relief for a violation of the contract, and the parties must be left to their remedy by an action at law. *Peoria & Rock Island R. R. Co. v. Coal Valley Mining Co.*, 295.
8. Railroad companies, as common carriers, owe the duty of transporting passengers and property to any and all persons who require the performance of such service. They cannot, by contract with one another, disable themselves from performing the duty imposed; and any contract purporting to do so is *ultra vires*, so far as the public are concerned. *Ib.*
9. A statute empowering railroad companies to consolidate their lines and to make leases and running arrangements on such terms as they may agree, does not confer upon such companies the power, by contract with each other in consolidating their roads and franchises, to absolve themselves from their duties as common carriers, simply by binding each other not to observe the requirements of the law. *Ib.*
10. The general rule that the agent to whom the owner intrusts goods for delivery to a carrier must be regarded as having authority to stipulate for the terms of transportation, extends to the case of a consignor of goods to a distant consignee, the owner. Under such circumstances, the consignor is the agent of the consignee for the purpose of shipping, and, as such, authorized to contract with the carrier as to the terms of transportation. *Nelson v. Hudson River R. R. Co.*, 305.
11. As an authority to deliver goods for transportation can only be executed by obtaining the consent of the carrier to receive them, the agent to deliver must be deemed authorized to make a special contract limiting the liability of a common carrier who receives the goods. *Ib.*
12. The plaintiff, having purchased a large mirror from K., W. &

CARRIERS—Continued.

Co., directed them to deliver it to the defendant, a railway company, for transportation to a specified point. K., W. & Co., sent a cartman to defendant's depot with the mirror, but defendant's agent declined to receive it unless the cartman would sign a contract relative to the terms of transportation. This contract contained a release of the defendant from damage by breakage, &c., not caused by defendant's negligence, in consideration of its agreeing to carry at tariff rates. Another clause required any objection to the contract to be notified to the defendant before the property was shipped, that a new contract might be made. The cartman signed the contract as agent for shipper and owner. It was also agreed between him and defendant's agent that the mirror should be retained until the next day, and should then be returned to the shippers if requested. These facts were made known by the cartman to K., W. & Co., and a duplicate of the contract delivered to them. On the next day, no request to return or dissent from the agreement having been made by them, the mirror was forwarded. In an action for damages to the owner from the breaking of the mirror while in defendant's charge, and in course of transportation,—*Held*, that K., W. & Co. were authorized to make the contract on behalf of the plaintiff; that they could depute the cartman to make it for them; that there was a complete ratification of his acts; and that the contract made by him was valid and binding upon plaintiff. *Id.*

13. The acceptance by a railway company, as a common carrier, of goods marked to a destination beyond the terminus of its road, creates a *prima facie* liability to transport to and deliver at that point. But the effect of such acceptance may be modified by a special contract, or by proof of a usage known to the shipper. *Mulligan v. Illinois Central R. R. Co.*, 822.
14. A bill of lading, stipulating that a railroad assumes no other responsibility as to the property shipped, than such as may be incurred upon its own road, if accepted by the shipper, in the absence of fraud or mistake, discharges the railroad from liability for a loss sustained beyond its terminus. *Id.*
15. As a bill of lading is signed by one party only, the evidence of assent to its terms by the other party is usually his accepting and acting upon it. And his acceptance without objection is conclusive of his assent, where it does not appear that any fraud or imposition was practiced, or that any mistake intervened. *Id.*
16. A railroad company receiving for transportation, as a common carrier, property, the place of destination of which is beyond

CARRIERS—Continued.

the terminus of the road, is bound, in the absence of any special contract, to carry safely to the end of its line, and to deliver to the next carrier in the route beyond. *Michigan Central R. R. Co. v. Mineral Springs Manufacturing Co.*, 381.

17. A railroad company cannot, under such circumstances, escape responsibility by storing the goods at the end of the route, without delivery or an attempt to deliver to the connecting carrier. If there be a necessity for storage, it will be considered a mere accessory to the transportation, and not as changing the nature of the bailment. The simple deposit of the goods in the railroad depot, unaccompanied by any act indicating an intention to renounce the obligation of a carrier, will not change or modify the liability of the company. *Id.*
18. Circumstances may arise after the goods have reached the depot which would justify the carrier in warehousing them, but if he had reasonable grounds to anticipate the occurrence of these adverse circumstances when he received the goods, he cannot by storing them change his relation towards them. *Id.*
19. A provision in the charter of a railroad company that the company shall be responsible for goods in their depots awaiting delivery as warehousemen, and not as common carriers,—*Held*, not to apply to goods in course of transportation awaiting delivery to a connecting carrier, where the other clauses of the section containing this provision were clearly limited to goods awaiting delivery to consignees. *Id.*
20. An unsigned notice, printed on the back of a receipt for goods delivered to a railway company for transportation, that all goods and merchandise are at the risk of the owners thereof while in the company's warehouses, except for such loss or injury as may arise from the negligence of the agents of the company, cannot operate to restrict the liability of the company as carrier. The law, in conceding to carriers the privilege to obtain any reasonable qualification of their responsibility by express contract, has gone as far in this direction as public policy will allow. *Id.*
21. Where goods in course of transportation must pass over the routes of several carriers between the point of shipment and their destination, a railway company which undertakes to convey them over a portion only of the route, and deliver them to the connecting carrier, is liable for the goods as a common carrier only until they are ready for delivery to such connecting carrier, and the latter has had a reasonable time to take them away. The connecting carrier is the agent of the owner or consignee to receive the goods. If they are not removed by

CARRIERS—Continued.

- him within a reasonable time, and are afterwards destroyed while in possession of the first carrier, the latter is liable only as warehouseman. *Wood v. Milwaukee & St. Paul R. R. Co.*, 842.
22. Such reasonable time for the connecting carrier to remove the goods is the earliest practicable time after the first carrier is ready to deliver them; it is not to be measured by any peculiar circumstances in the condition of the connecting carrier, rendering a longer time necessary for his convenience. *Id.*
23. Where goods ready for delivery by a railway company to a connecting carrier are destroyed, it is a question for the jury to say, from the circumstances of the case, subject to the principles above stated, whether a reasonable time had elapsed for the removal of the goods by the connecting carrier. *Id.*
24. Where goods in course of transportation must pass over the routes of several carriers between the point of shipment and their destination, a railway company which undertakes to convey them over a portion only of the route, and deliver them to the connecting carrier, is liable for the goods as a common carrier, not only while they are in actual transit over its line of railway, but until an actual delivery of them to the connecting carrier. *Conkey v. Milwaukee & St. Paul R. Co.*, 358.
25. The cases of *Schneider v. Evans*, 25 Wis. 241, and *Wood v. Milwaukee, &c. R. Co.*, 27 *Id.* 541, and *ante*, 842, bearing on the question, explained; and the decision in the latter case overruled. *Id.*
26. *It seems*, that in extraordinary cases, as where a break or interruption in the line of transit, or the fact of war, render it impossible to send the goods forward, or make considerable delay in the transportation necessary, the carrier may store the goods and at once give notice to the consignee or owner, and will then be absolved from liability as carrier. *Id.*
27. Although railroads owe a higher duty to their passengers than to strangers, the utmost care and skill being required of them, as common carriers, towards their passengers, they also owe to strangers such diligence as would be exercised by prudent, skillful, and discreet men, having a due regard to the rights and demands of the public, and a proper desire to protect life and property. *Illinois Central R. R. Co. v. Phillips*, 374.

CATTLE.

1. In an action against a railway company to recover damages for the loss of a colt which had been run over and killed by the defendant's train,—*Held*, that the facts that the colt had been

CATTLE—Continued.

- taken up by the plaintiff as an estray, and that, in attempting to comply with the law respecting estrays, the plaintiff had not posted the animal in the mode required by law, did not constitute a defense. Such a case is within the rule that any person in the peaceable possession of property may sue and recover for any wrongful damage it may sustain, against any person but the owner. *Chicago & Northwestern R. Co. v. Shulte*, 417.
2. The common law rule requiring an owner of cattle to confine his stock on his own premises is not in force in Mississippi. In that state, each occupant of lands must secure his fields against the intrusion of animals; and cattle owners may allow their cattle to range on uninclosed lands, whether of railroad companies or individuals. *New Orleans, Jackson, & Great Western R. R. Co. v. Field*, 439.
 3. A railroad company is no more bound to fence its lands than an individual. And in an action against a railroad company for an injury to cattle that have strayed upon its track, it is a sufficient defense for the company to show that it employed skillful management for its locomotives, and the injury occurred while it was in the regular prosecution of its lawful business, and could not have been avoided by exercise of the degree of skill and care which a discreet man in such circumstances would employ. *Ib.*
 4. The owner of cattle allowing them to run on lands contiguous to the railroad takes the risk of their being killed by the trains, subject to the exercise of due care upon the part of the company. *Ib.*

CHANCERY.

See EQUITY.

CHARTERS.

- As to construction of provisions of charters, see CARRIERS, 19; LANDS, 6-8.
- As to statutes impairing contract obligations in charters, see CARRIERS, 1, 2, 6; FENCES, 10.

CONNECTING LINES.

As to liability for injury to or loss of goods received to be forwarded by connecting lines, see CARRIERS, 13-26.

CONSIGNOR AND CONSIGNEE.

As to when consignor is deemed agent of consignee to ship goods, see CARRIERS, 10-12.

CONSOLIDATION.

As to effect of statutes authorizing consolidation of railway companies, see **CONTRACTS**, 4

CONSTITUTIONAL LAW.

As to construction of constitutional provisions, see **LANDS**, 6-9; **MUNICIPAL CORPORATIONS**, 8; **TAXES**, 1, 3, 5-6.

CONTRACTS.

1. An agreement to secure to a railway company, free of expense, the right of way over certain lands, to include a strip of land a specified number of feet in width, is virtually an agreement for the sale of an interest in land, within the statute of frauds; and if executed by an agent of the owner, the authority to execute it should be in writing. Or if, the owner being unlettered, such an instrument is signed with his name by another in his presence and by his direction, if such direction to execute the instrument is obtained by misrepresentations as to its contents and effect, made by such other person for the purpose of inducing the land-owner to execute the instrument, it is void. *Rockford, Rock Island, & St. Louis R. R. Co. v. Schunick*, 28.
2. An injunction should not be granted to restrain the transportation by a railroad of the property of individuals, because the railroad company has failed to make the payments stipulated in a contract entered into by such company for the use of another road in carrying passengers and goods. The interest of the public in the use and continued operation of railroads forbids the courts to afford such relief for a violation of the contract, and the parties must be left to their remedy by an action at law. *Peoria & Rock Island R. R. Co. v. Coal Valley Mining Co.*, 295.
3. Railroad companies, as common carriers, owe the duty of transporting passengers and property to any and all persons who require the performance of such service. They cannot, by contract with one another, disable themselves from performing the duty imposed; and any contract purporting to do so is *ultra vires*, so far as the public are concerned. *Id.*
4. A statute empowering railroad companies to consolidate their lines and to make leases and running arrangements on such terms as they may agree, does not confer upon such companies the power, by contract with each other in consolidating their roads and franchises, to absolve themselves from their duties as common carriers, simply by binding each other not to observe the requirements of the law. *Id.*
5. A railroad company which has leased and is actually operating a

CONTRACTS—Continued.

railroad is liable in damages for injuries caused by its servants in their management of the road. Its liability is not affected by the terms of a contract made with its lessor limiting its responsibility to payment of operating expenses and for making necessary repairs. *Louisville & Nashville R. R. Co. v. Norton*, 436.

As to execution of agreement to secure right of way for railroad, see **LANDS**, 11; of agreement to subscribe for stock, see **STOCK**, 1-4.

As to when acceptance of contract without objection constitutes assent to its terms, see **CARRIERS**, 15.

As to what contracts are solvable in confederate currency, see **BONDS**.

As to special contracts limiting liability of carrier, see **CARRIERS**, 11-14, 20; limiting liability for negligence, see **LEASE**, 8.

As to specific performance of contracts, see **SPECIFIC PERFORMANCE**. See also **BILLS OF LADING**; **BONDS**; **DEEDS**; **LEASE**; **SALES**.

COUNTIES.

As to the power of counties to aid railroads, see **MUNICIPAL CORPORATIONS**, 8, 9.

DAMAGES.

1. In an action to recover damages for causing the death of a child, aged three years, the absence of proof of special pecuniary damage to the next of kin is not a ground for nonsuiting the plaintiff, or directing the jury to find only nominal damages. *So held*, in an action under the statute of New York, which does not limit the recovery in such cases to the actual pecuniary loss proved. *Ihl v. Forty-Second Street and Grand Street Ferry R. R. Co.*, 409.

2. In an action for damages for an injury to property resulting from the negligence of the defendant, the plaintiff may be allowed interest on the value of the property from the date of the injury. *Chicago & Northwestern R. Co. v. Shultz*, 417.

3. The damage sustained by an adjoining proprietor, whose buildings and other property, situated at a distance from the line of a railway, are destroyed by fire communicated from an engine on the railroad, to the grass and stubble on land of the railway, and thence by similar combustible material on his own land to the buildings and property destroyed, are proximate, not remote, within the meaning of the maxim, "*causa proxima, non remota, spectatur*." The rule is not that the injury sustained must be the necessary or unavoidable result of the

DAMAGES—Continued.

wrongful act, but that it shall be the natural and probable consequence of it, or likely to ensue from it. The destruction of property in the manner stated, is a result reasonably to be anticipated from the firing of the combustible material on the railway track; and the omission to remove it may properly be considered, by the jury, negligence with respect to the property destroyed. *Kellogg v. Chicago & Northwestern R. Co.*, 488.

As to damages for private property taken for railroad purposes, see LANDS, 1-18, 16, 17; LEASE, 2.

For injury to or loss of goods carried by railroad, see CARRIERS.

For injuries arising from negligence, see NEGLIGENCE.

DEEDS.

1. A deed conveying to a railway company the right of way over and through certain lands "for all purposes connected with the construction, use, and occupation" of their railway, gives the company the right to sink a well upon such land, and to use, for railway purposes, the water supplied to such well by percolation, although the supply of water to a spring upon adjoining land of the grantor may be materially diminished thereby. *Hogan v. Milwaukee & St. Paul R. Co.*, 48.

2. In a conveyance of a strip of land to a railroad company for the location of its road, a reservation of "a right of way for carts, teams, and cattle within the location aforesaid, where the said way now exists, the same to be made and kept by the grantees in a convenient state of use for the purposes aforesaid," implies that the company is to keep the way open, and unobstructed by gates, bars, or other barriers, if the existing way referred to is, at the time, open and unobstructed. *Eames v. Worcester & Nashua R. R. Co.*, 462.

DELIVERY.

As to the obligation to deliver goods to connecting carriers, see CARRIERS, 18, 16-19, 21-26.

DIRECTORS.

See OFFICERS.

DISCRIMINATIONS.

As to right of carriers to make discriminations in charges, see CARRIERS, 1-5.

DIVIDENDS.

As to who is entitled to dividends after sale and transfer of stock, see STOCK, 5.

As to taxes upon stock dividends, see STOCK, 6, 7.

EJECTMENT.

Where a railway company, having acquired the title in fee to one undivided moiety of certain lands, and a life estate in the other moiety, constructs and operates its road over the land, an action of ejectment, brought by the remainder-men upon the expiration of the life estate, will not lie. The act of the railway company in locating and maintaining its road over the land while it has the exclusive right of possession is a lawful use of its own property; and the subsequently accruing right of the remainder-men to the joint possession does not convert such lawful use into a wrong, or make the exclusion of the plaintiffs from co-occupancy such an unlawful ouster as will support an action of ejectment between tenants in commor. *So held*, where a special remedy in such cases was provided by statute. *Austin v. Bullard R. R. Co.*, 46.

EQUITY.

As to when decree for injunction or specific performance against railway company will be refused as contrary to public interest, see **CARRIERS**, 7; **STATIONS**.

ESTATES.

As to rights of railway company as tenant for life in lands, see **LANDS**, 15.

ESTOPPEL.

1. In a proceeding to condemn lands for the construction of a railroad, the railroad company, to defeat the right of the owner to damages, introduced in evidence a writing containing a conditional subscription to the stock of the company, and an agreement to secure to the company their right of way free of expense, signed by the owner of the land and others. The instrument contained a proviso that it should not be delivered to the railroad company until one hundred subscribers should be secured. *Held*, that the act of receiving one hundred subscribers was a condition precedent to the company's having any beneficial interest under the instrument; and to show performance of the condition, it was not enough that one hundred names appeared on the instrument; the genuineness of the signatures must be proved. *Rockford, Rock Island, & St. Louis R. Co. v. Schunick*, 29.
2. Such an instrument could not operate as an estoppel *in pais*, unless the railroad company should show that it accepted the terms of the instrument, and was so far governed and in-

ESTOPPEL—Continued.

fluenced by them in its action that to allow the subscribers to withdraw from or deny what was proposed or agreed by the instrument to be done, would be a fraud upon or unjust to the company. *Id.*

8. The owners of certain car-works, near the line of the defendants' railway, having applied to the defendants for a connection of their works by a side track with the railway, their application was granted and the track built at their expense. They continued to use the track for several years for the delivery of freight and cars, expending meantime large sums of money in the extension of their works, and in the erection of new buildings, to which the side track connection with the railway was extended in a similar manner. A controversy arose between the parties, and the defendants gave notice of their intention to remove the side track; whereupon the owners of the car-works filed a bill in equity praying an injunction to restrain the defendants from taking up such track, and a temporary injunction was obtained. Upon the hearing, the evidence not showing any contract, express or implied, for the perpetual use of the side track by the complainants,—*Held*, that the transaction between the parties was merely a parol license for the permissive use of the side track; and such license was not rendered irrevocable, under the doctrine of equitable estoppel, by the fact that the complainants had expended large sums of money on the faith of its indefinite continuance. *Jackson & Sharp Company v. Philadelphia, Wilmington, & Baltimore R. R. Co.*, 70.
4. A claim to the perpetual use of a side track connecting a railway with adjoining premises, appurtenant to such premises, passing with the title to them, and binding the land of the railway company into whosoever hands it may come, cannot be sustained by a mere parol license to construct and use such a track. Such a right is an easement or interest in land which cannot, at law, be created or transferred by license. Nor will the revocation of such a license be restrained, in equity, on the ground of equitable estoppel, because of the expenditure of large sums of money by the licensee, relying upon its continuance, where no fraud is shown. The principle of equitable estoppel is applied solely to prevent fraud. *Id.*

ESTRAYS.

As to right of action for injury to animal taken up as estray, see CATTLE, 1.

EVIDENCE.

1. Statements made in a letter or other document written by an officer of a railway corporation, not accompanied by proof that he had authority to represent the company, or that his duties extended to the business in question, are not admissible in evidence against the company. *Commonwealth v. Pittsburgh, Fort Wayne, & Chicago R. R. Co.*, 220.
 2. In an action against a railroad company to recover damages for injuries sustained by the plaintiff while in the defendant's station, from an explosion of the boiler of a locomotive of the defendant, the mere fact of such explosion is not conclusive evidence of negligence on the part of defendant; it is presumptive evidence only, throwing the burden of disproving negligence upon the defendant. *Illinois Central R. R. Co. v. Phillips*, 374.
 3. Where, in such a case, it is shown that the iron used in the construction of the boiler is of the kind usually employed, has been subjected to and resisted the usual tests, and has been used by experienced persons with prudence and skill, this presumption is overcome, and the inference must be that the explosion occurred from some latent defect, not detected by the usual and proper tests. *Id.*
 4. The case of *Illinois Central R. R. Co. v. Phillips*, 49 *ILL.* 234, upon this point, affirmed upon a rehearing. *Id.*
 5. In an action against a railway company to recover damages for injuries to plaintiff's cattle, run over by a locomotive on the defendant's road, declarations by the engineer in charge of the locomotive, made subsequent to the time of the accident, at a distant place and when he was not engaged in any business of the defendant's, are not admissible as evidence against the company. *Michigan Central R. R. Co. v. Gougar*, 421.
- As to what evidence is admissible to show damages to lands from construction of railroad, see **LANDS**, 3, 4.
- As to when declarations of officer or employee are admissible against railway company, see **NEGLIGENCE**, 16; **OFFICERS**, 1.
- As to when parol evidence is admissible to explain a writing, see **STOCK**, 1.

FENCES.

1. In an action against a railway company to recover damages for causing the death of a conductor, the evidence showed that the fence along the railway was out of repair, and, some horses being on the track at that point, they were run into by the train in charge of the deceased, the train thrown off the track, and the conductor killed. *Held*, that although the statute of

FENCES—Continued.

Iowa required the railway company to erect and maintain such fence, these facts did not, under that statute, constitute any ground for such an action. Nor could the railway company be held liable on the ground of negligence; the deceased being the superior officer of the train, and having directed the line of conduct which resulted in his death. *Dewey v. Chicago & North Western R. Co.*, 869.

2. In such cases new trials should be granted by the *nisi prius* courts whenever the verdict of the jury fails to administer substantial justice to the parties. The more limited rule which controls appellate tribunals, has no application to courts at *nisi prius*. *Id.*
3. The common law rule requiring an owner of cattle to confine his stock on his own premises is not in force in Mississippi. In that state, each occupant of land must secure his fields against the intrusion of animals; and cattle owners may allow their cattle to range on uninclosed lands, whether of railroad companies or individuals. *New Orleans, Jackson, & Great Western R. R. Co. v. Field*, 439.
4. A railroad company is no more bound to fence its lands than an individual. And in an action against a railroad company for an injury to cattle that have strayed upon its track, it is a sufficient defense for the company to show that it employed skillful management for its locomotives, and the injury occurred while it was in the regular prosecution of its lawful business, and could not have been avoided by exercise of the degree of skill and care which a discreet man in such circumstances would employ. *Id.*
5. The owner of cattle allowing them to run on lands contiguous to the railroad, takes the risk of their being killed by the trains, subject to the exercise of due care upon the part of the company. *Id.*
6. A statute requiring railroad companies to erect and maintain fences along their tracks, and making them liable to adjoining proprietors for damage caused by a failure to fence, is within the legislative power. The legislature may have no right to subject one person to expense for the sole benefit of another; but in such a statute the protection of the property of adjacent proprietors is merely an incidental object. The main and leading object is the protection of the public. And the liability of the railroad company for such failure to fence extends not only to cases where the traveling public would be endangered by the act which caused the damage to the adjoining owner—as in case of a collision with his cattle—but to cases where,

FENCES—Continued.

- by reason of the failure of the road to fence, cattle stray from the track upon the land bordering the road, and destroy the crops. *Trice v. Hannibal & St. Joseph R. R. Co.*, 445.
7. A statute providing that when any animal is killed by the trains of a railway company, the owner may recover its value without any proof of negligence on the part of the company, except in cases of accident occurring where the road is enclosed by a lawful fence, or at the crossing of a public highway, does not render a railroad company liable, regardless of the question of negligence, for the value of an animal killed at a place not fenced, near the company's station, and which is necessarily left open for the reception and discharge of freight and passengers. *Lloyd v. Pacific R. R. Co.*, 448.
 8. Under the statute of Illinois requiring railway companies to erect and maintain fences along their lines of road, if, where a railroad is enclosed by a sufficient fence, a breach occurs therein by reason of the unlawful act of a stranger, and through such breach cattle get upon the track and are injured, the railroad company, in the absence of negligence on its part, will not be liable, unless the accident happened after the lapse of a sufficient time for the company, in the exercise of reasonable diligence, to have discovered and repaired the breach, before the injury occurred. *Chicago & Northwestern R. Co. v. Barrie*, 451.
 9. The declaration in an action against a railway company, commenced October 30, 1868, to recover for an injury to a colt owned by the plaintiff, resulting from a failure to fence along the track, alleged that "on January 1, 1867, and from thenceforward to the commencement of this suit, the defendants were possessed and had the entire control of" the road, "and had the right to run upon the same locomotives and trains." It also alleged that "the defendant, more than six months after the said railroad was in use, and continuously to the time of committing the grievances," &c., neglected to comply with the requirements of the statute in regard to fences. *Held*, that it did not appear with sufficient certainty that the defendant had failed to erect proper fences after the road had been "opened for use" a period of six months, that time being allowed by the statute; and a demurrer to the declaration must be sustained. *Toledo, Peoria, & Warsaw R. R. Co. v. Bookless*, 454.
 10. A railroad company had commenced and partly completed the construction of its road,—the track being partly graded but the rails not laid,—when a statute requiring railroad companies to erect and maintain fences along their roads was passed.

FENCES—Continued.

The company was chartered before, but the location of the road was not filed until after the passage of the act, and no other title from the owner was shown. *Held*, that the company was under obligation to fence according to the requirements of the statute; and having failed to do so, it was liable, under the statute, in damages, for causing the death of a horse which escaped upon the track for want of a fence, and was there killed by a locomotive of the company. *Sawyer v. Vermont & Massachusetts R. R. Co.*, 459.

11. In a conveyance of a strip of land to a railroad company for the location of its road, a reservation of "a right of way for carts, teams, and cattle, within the location aforesaid, where the said way now exists, the same to be made and kept by the grantees in a convenient state of use for the purposes aforesaid," implies that the company is to keep the way open, and unobstructed by gates, bars, or other barriers, if the existing way referred to is, at the time, open and unobstructed. *Eames v. Worcester & Nashua R. R. Co.*, 463.
12. No obligation to erect and maintain gates or other barriers across such a way is imposed by a statute requiring railroad companies to "erect and maintain suitable fences, with convenient bars, gates, or openings therein, at such places as may reasonably be required, upon both sides of the entire length" of their roads, "except in the crossings of a turnpike, highway, or other way, or at places where a convenient use of the road would be thereby obstructed." *Ib.*
13. An allegation in a complaint that certain colts and sheep owned by plaintiff, having strayed, without any fault of the plaintiff, upon the track of the defendant, a railway company, the defendant "so carelessly and negligently ran and managed its locomotive and cars, and its railroad track, grounds, and fences, that its locomotive and cars ran against and over said horses and colts," &c., is not a sufficient statement of a cause of action for injuries caused by neglect of the company to maintain proper fences, in consequence of which the animals strayed on the track and were killed. *Antisdel v. Chicago & Northwestern R. Co.*, 467.
14. But as such an allegation sufficiently avers negligent management of the train, it will be presumed, on appeal, in order to sustain a judgment for the plaintiff, that there was evidence on the trial to warrant a recovery on that ground, where the bill of exceptions does not purport to contain all the evidence. *Ib.*
15. A statute which requires railroad companies to erect and maintain fences along their tracks, and makes them liable, in case

FENCES—Continued.

they neglect to do so, for all injuries to animals straying upon their tracks, imposes upon them the duty of exercising a high degree of diligence in keeping such fences in repair. Ordinary diligence, as usually defined, is not sufficient. *Id.*

FIRES.

As to liability for injury to property by fire communicated from locomotive, see NEGLIGENCE, 23-30.

FREIGHT.

As to right to make discriminations in charges for freight, see CARRIERS, 1-5.

HIGHWAYS.

1. The construction and operation of a horse railway in a city street, is not such an appropriation of the street to a new use, that the owners of adjoining lots and of the fee of the land taken for the street are entitled to compensation therefor, except where such an owner suffers some private and peculiar injury; as, by being deprived of the free access to his premises which he would otherwise continue to have. *Hobart v. Milwaukee City R. Co.* 35.
2. The owner of a store who is accustomed to have wagons with horses stand crosswise upon the street in front thereof while goods are loaded and unloaded, has no such right to the use of the street as will entitle him to recover compensation for or to enjoin the construction of a street railway, authorized by the public authorities, on the ground that the construction and operation thereof will interfere with his using the street in such manner. *Id.*
3. Where the fee of a street within the limits of an incorporated city is in the proprietors of the adjoining lands, neither the State nor the municipal authorities can grant to a railway company the right to construct its track across the street, without obtaining the consent of or making compensation to such adjoining owners. *Indianapolis, Bloomington, & W. R. Co. v. Hartley*, 59.
4. Where the fee in a highway remains in the owners of the adjoining lands, it is immaterial whether the easement of the public was acquired by condemnation or dedication; a different use of the land from that for which it was dedicated, or in view of which damages were assessed to the owner, cannot be justified on the ground that a railway is an improved highway. *Id.*
5. The obligation imposed by the common law upon one who, for

HIGHWAYS—Continued.

his own benefit, cuts through a highway, to furnish to the public a proper crossing, even though he acts under a license from the proper authorities, extends to railway corporations; and a railway company is not relieved of its duty to keep in proper condition its intersection with a highway, merely because of a slight alteration of the line of the highway so as to change the precise place of crossing, especially where the change has been made with the assent and co-operation of the company. *People ex rel. City of Bloomington v. Chicago & Alton R. R. Co.*, 66.

6. *Query*, whether a railway company could be required by the legislature to construct safe crossings at the intersection of streets laid out after the construction of the railway? *Ib.*

As to injuries to traveler on a highway crossing a railroad, see NEGLIGENCE, 8-10.

INCORPORATION.

A railroad company was incorporated by the legislatures of Maine and New Hampshire, and its road was located and operated in both those states. *Held*, that an action against the company for damages resulting from an unreasonable discrimination against the plaintiff in terms and accommodations, made by the company on that part of its road situated in Maine, could be maintained in New Hampshire. *McDuffee v. Portland & Rochester Railroad*, 261.

INDICTMENT.

1. Although the language of the act of North Carolina of February 16, 1871,—which requires the president and directors of a railroad company to account with and transfer to their successors all the money, books, papers, and choses in action belonging to such company, and makes a failure to do so a misdemeanor,—is sufficiently general to include bonds of the State, yet that act cannot be construed to apply to the special tax bonds which, by the acts of February 5 and March 8, 1870, are required to be returned to the public treasurer; and an indictment against the president of a railroad company, for refusing to transfer to his successor such special tax bonds, cannot be sustained. *State v. Jones*, 228.
2. In a criminal prosecution founded on a statute requiring all presidents of railroads in which the state is interested under any act or ordinance passed after a specified date, to return to the public treasurer all bonds of the state remaining in the hands of such president, an indictment which merely charges

INDICTMENT—*Continued.*

that the defendant was president of a certain named railroad, and as such refused to return bonds which had come into his hands, is fatally defective for want of averments that the state had an interest in the road named, and that the bonds were received by the defendant under an act passed after the date specified. A motion to quash such an indictment should be granted. *State v. Sloan*, 230.

INFANTS.

As to what constitutes negligence in the care of a child, contributing to an injury, see **NEGLIGENCE**, 12, 13.

INJUNCTION.

An injunction should not be granted to restrain the transportation by a railroad of the property of individuals, because the railroad company have failed to make the payments stipulated in a contract entered into by such company for the use of another road in carrying passengers and goods. The interest of the public in the use and continued operation of railroads forbids the courts to afford such relief for a violation of the contract, and the parties must be left to their remedy by an action at law. *Peoria & Rock Island R. R. Co. v. Coal Valley Mining Co.*, 295.

INTEREST.

In an action for damages for injury to property resulting from the negligence of the defendant, the plaintiff may be allowed interest on the value of the property from the date of the injury. *Chicago & Northwestern R. Co. v. Shultz*, 417.

JURISDICTION.

A railroad company was incorporated by the legislatures of Maine and New Hampshire, and its road was located and operated in both those states. *Held*, that an action against the company for damages resulting from an unreasonable discrimination against the plaintiff in terms and accommodations, made by the company on that part of its road situated in Maine, could be maintained in New Hampshire. *McDuffee v. Portland & Rochester Railroad*, 261.

JURY.

The discretion of a jury to judge of the credibility of witnesses is not arbitrary; they must exercise their discretion,—not their will, merely. In this respect the action of a jury may be reviewed by an appellate court. *Chicago, Burlington, & Quincy R. R. Co. v. Stumps*, 885.

LANDS.

1. The true basis for estimating the damages to be allowed for the taking of land of a private individual by a railway company for the construction of their road, is the actual situation of the land, and the use to which it was applied and intended to be applied by the owner. The division of the property into lots and blocks upon a map, or the separation of one portion from the remainder by a street, is not ground for restricting the damages to compensation for the injury to the lots of which part is actually taken. *Welch v. Milwaukee & St. Paul R. Co.*, 1.
2. A tract of land within the limits of a city had been laid out into lots, which were acquired by the owner at different times, but the whole was used by him as one tract for agricultural purposes. A strip of land from some of the lots, separated by a public street from the larger portion of the tract, having been taken by a railway company for their road,—*Held*, that the owner was entitled to compensation for the injury to the whole property, and not merely for the injury to the separate lots over which the railroad was built. *Id.*
3. In an action for damages to plaintiff's land from the construction of a railroad over it by defendant, the fact was conceded that the excavation of the road had rendered a retaining wall necessary for the protection of plaintiff's lot. The defendant offered to show that its engineer had been directed to construct such a wall, for the security of the road-bed, and that materials were provided, and the work about to be commenced. *Held*, that this evidence was properly excluded. Inasmuch as the charter of the railway company required it to compensate the owner of land taken, for all damage sustained by him by reason of the taking and using his land, evidence which could tend only to diminish the compensation for damages admitted to have already resulted to the plaintiff was not admissible. *Thompson v. Milwaukee & St. Paul R. Co.*, 9; *Price v. Same*, 14.
4. The offer of a stipulation by defendant, in connection with such evidence, that if the retaining wall was not built, the verdict should not affect plaintiff's right to recover, in another action, the cost of building such wall, did not alter the case. The plaintiff could not be turned over to another action, for the recovery of damages which had already resulted to his lot from the construction of defendant's road. *Id.*; *Id.*
5. Under such a provision in the charter of a railway company, the damages recoverable by an owner of land across which the road was constructed, who had placed certain fixtures upon the

LANDS—Continued.

premises to adapt them to use as a water-cure, may properly include the difference between the value of such fixtures while connected with the property as a water-cure, and their value when removed and applied to other uses; where the construction of the railroad across the premises is shown to have rendered them unfit for use as a water-cure. *Price v. Milwaukee & St. Paul R. Co.*, 14.

6. Where the constitution of a State provides that "the property of no person shall be taken for public use without just compensation therefor" (*Wis. Const.* art. 1, § 18), a railway charter which simply makes provision for an appraisal and award of "the value of the land taken," and is silent as to compensation for damages resulting to land of the same owner and part of the same tract, not taken by the railway company, must be construed to mean that a "just compensation" shall be awarded for the land taken; otherwise the charter would be void for repugnance to the constitution. *Bigelow v. West Wisconsin R. Co.*, 20.
7. The "just compensation" for property taken for public use required by such a constitutional provision, consists in paying to the owner not only the value of the portion of the property actually taken, but also the amount of the diminution in value of the portion not taken. *Ib.*
8. Thus, where a person owned a quarter-section of land, part of which was taken under the provisions of such a charter for the construction of a railroad,—*Held*, that in an action against the railway company for taking his land, he might show the diminution in value of the entire quarter-section, resulting from the construction of the railroad, although the road was located wholly upon one "forty" of the quarter-section. *Ib.*
9. In a proceeding to condemn lands for the construction of a railroad, the railroad company, to defeat the right of the owner to damages, introduced in evidence a writing containing a conditional subscription to the stock of the company, and an agreement to secure to the company their right of way free of expense, signed by the owner of the land and others. The instrument contained a proviso that it should not be delivered to the railroad company until one hundred subscribers should be secured. *Held*, that the act of receiving one hundred subscribers was a condition precedent to the company's having any beneficial interest under the instrument; and to show performance of the condition, it was not enough that one hundred names appeared on the instrument; the genuineness of the signatures must be proved. *Rockford, Rock Island, & St. Louis R. R. Co. v. Schunick*, 28.

LANDS—Continued.

10. Such an instrument could not operate as an estoppel *in pais*, unless the railroad company should show that it accepted the terms of the instrument, and was so far governed and influenced by them in its action that to allow the subscribers to withdraw from or deny what was proposed or agreed by the instrument to be done, would be a fraud upon or unjust to the company. *Ib.*
11. An agreement to secure to a railroad company, free of expense, the right of way over certain lands, to include a strip of land a specified number of feet in width, is virtually an agreement for the sale of an interest in land, within the statute of frauds; and if executed by an agent of the owner, the authority to execute it should be in writing. Or if, the owner being unlettered, such an instrument is signed with his name by another in his presence and by his direction, if such direction to execute the instrument is obtained by misrepresentations as to its contents and effect, made by such other person for the purpose of inducing the land owner to execute the instrument, it is void. *Ib.*
12. The construction and operation of a horse railway in a city street, is not such an appropriation of the street to a new use, that the owners of adjoining lots and of the fee of the land taken for the street are entitled to compensation therefor, except where such an owner suffers some private and peculiar injury; as, by being deprived of the free access to his premises which he would otherwise continue to have. *Hobart v. Milwaukee City R. R. Co.*, 85.
13. The owner of a store who is accustomed to have wagons with horses stand crosswise upon the street in front thereof while goods are loaded and unloaded, has no such right to the use of the street as will entitle him to recover compensation for or to enjoin the construction of a street railway, authorized by the public authorities, on the ground that the construction and operation thereof will interfere with his using the street in such manner. *Ib.*
14. A deed conveying to a railway company the right of way over and through certain lands "for all purposes connected with the construction, use, and occupation" of their railway, gives the company the right to sink a well upon such land, and to use, for railway purposes, the water supplied to such well by percolation, although the supply of water to a spring upon adjoining land of the grantor may be materially diminished thereby. *Hougan v. Milwaukee & St. Paul R. Co.*, 43.
15. Where a railway company, having acquired the title in fee to

LANDS—Continued.

one undivided moiety of certain lands, and a life estate in the other moiety, constructs and operates its road over the land, an action of ejectment, brought by the remainder-men upon the expiration of the life estate, will not lie. The act of the railway company in locating and maintaining its road over the land while it has the exclusive right of possession is a lawful use of its own property; and the subsequently accruing right of the remainder-men to the joint possession does not convert such lawful use into a wrong, or make the exclusion of the plaintiffs from co-occupancy such an unlawful ouster as will support an action of ejectment between tenants in common. *See held*, where a special remedy in such cases was provided by statute. *Austin v. Rutland R. R. Co.*, 40.

10. Where the fee of a street within the limits of an incorporated city is in the proprietors of the adjoining lands, neither the state nor the municipal authorities can grant to a railway company the right to construct its track across the street, without obtaining the consent of or making compensation to such adjoining owners. *Indianapolis, Bloomington, & W. R. Co. v. Hartley*, 59.
17. Where the fee in a highway remains in the owners of the adjoining lands, it is immaterial whether the easement of the public was acquired by condemnation or dedication; a different use of the land from that for which it was dedicated, or in view of which damages were assessed to the owner, cannot be justified on the ground that a railway is an improved highway. *Ib.*
18. In assessing real property belonging to a railway company, consisting of a strip of land but a few rods in width, upon which the railroad track is located, with the necessary stations, buildings, &c., the land should not be assessed as an isolated piece of property, but as part of the whole railway; and its value should be estimated in connection with its position, and the business and profit derived therefrom. *People ex rel. Buffalo & State Line R. R. Co. v. Barker*, 149.
19. The provision of 1 *N. Y. Rev. Stat.* 889, § 6,—that “the real estate of all incorporated companies liable to taxation shall be assessed in the town or ward in which the same shall be, in the same manner as the real estate of individuals,”—applies to lands of a railway company over which their road is located; and such land is properly assessed to the railway company by the assessors of the town or ward in which it is situated, and not as “non-resident” lands. *Ib.*
20. *It seems*, that, within the meaning of the laws for the assess-

LANDS—Continued.

ment of taxes, a railroad corporation is a resident of all the towns through which its road is located. *Ib.*

21. For purposes of taxation a railway corporation is to be regarded as a resident of each town and county through which its road passes; and its real estate may therefore be properly assessed in the town or county where the land is situated, as real estate of a resident, and not as land of a non-resident. *Buffalo & State Line R. R. Co. v. Supervisors of Erie County*, 163.
22. The decision of the assessors upon the question whether real estate of a railway corporation, whose principal office is located in another county, shall be assessed as resident or non-resident land, cannot be attacked collaterally. In all cases within their jurisdiction assessors act judicially in making assessments, and the assessment roll has the force of a judgment. The tax so assessed by them cannot be recovered back after it has been paid into the public treasury. *Ib.*

As to the duty of a railroad company to fence its lands and track, see **FENCES**, 8-10.

LEASE.

1. A lease by a railway corporation of its railroad, with all the land upon and across which its railroad or its machine shops, warehouses, freight or passenger depots or buildings are constructed, covers all land acquired by the lessor for use in operating the road, the use of which is advantageous and beneficial, and without which the use of the road or any part of it would be less convenient and valuable. *Matter of New York Central R. R. Co.*, 175.
2. Prior to the execution of such a lease, a railway company had acquired the title to a strip of land for the purpose of using it as a street in connection with its railroad and depot, to enable it to operate its road in a more advantageous and convenient manner than it could do otherwise. *Held*, that the lease included such strip of land; and although neither the lessor nor the lessee actually obtained the use of the land as a street until it was taken for the construction of another railroad, the damages for such taking should embrace the injury to the depot, &c., by being deprived of its use; and the lessee was entitled to the money awarded as damages, during the term of the lease. *Ib.*
3. A railroad company which has leased and is actually operating a railroad is liable in damages for injuries caused by its servants in their management of the road. Its liability is not affected by the terms of a contract made with its lessor limiting its re-

LEASE—Continued.

sponsibility to payment of operating expenses and for making necessary repairs. *Louisville & Nashville R. R. Co. v. Norton*, 436.

LEGISLATURE.

As to the power of the legislature to authorize municipal corporations to aid railroads, see **MUNICIPAL CORPORATIONS**, 1-9.

To prevent unjust discriminations by carriers, see **CARRIERS**, 1.

LICENSE.

1. The owners of certain car-works, near the line of the defendants' railway, having applied to the defendants for a connection of their works by a side track with the railway, their application was granted and the track built at their expense. They continued to use the track for several years for the delivery of freight and cars, expending meantime large sums of money in the extension of their works, and in the erection of new buildings, to which the side track connection with the railway was extended in a similar manner. A controversy arose between the parties, and the defendants gave notice of their intention to remove the side track; whereupon the owners of the car-works filed a bill in equity praying an injunction to restrain the defendants from taking up such track, and a temporary injunction was obtained. Upon the hearing, the evidence not showing any contract, express or implied, for the perpetual use of the side track by the complainants,—*Held*, that the transaction between the parties was merely a parol license for the permissive use of the side track; and such license was not rendered irrevocable, under the doctrine of equitable estoppel, by the fact that the complainants had expended large sums of money on the faith of its indefinite continuance. *Jackson & Sharp Company v. Philadelphia, Wilmington, & Baltimore R. R. Co.*, 70.
2. A claim to the perpetual use of a side track connecting a railway with adjoining premises, appurtenant to such premises, passing with the title to them, and binding the land of the railway company into whosoever hands it may come, cannot be sustained by a mere parol license to construct and use such a track. Such a right is an easement or interest in land which cannot, at law, be created or transferred by license. Nor will the revocation of such a license be restrained, in equity, on the ground of equitable estoppel, because of the expenditure of large sums of money by the licensee, relying upon its continuance, where no fraud is shown. The principle of equitable estoppel is applied solely to prevent fraud. *Id.*

MASTER AND SERVANT.

As to liability of railway company for death of a conductor resulting from his own negligence, see NEGLIGENCE, 1.

MUNICIPAL CORPORATIONS.

1. The principle that, independent of constitutional prohibitions, a statute authorizing a municipal corporation to aid by stock subscriptions in the construction of a railway having a special relation to the business and interests of the municipality, is within the general scope of legislative power, extends to an act authorizing a city, through trustees, to construct a railway entirely at its own expense, and to levy taxes to pay the cost of construction, if such railway is essential to the interests of the city; and upon the question as to the probable benefit of a particular railway to the municipality, the decision of the majority of the corporation, acting under legislative sanction, will not be reviewed by the courts. *Walker v. City of Cincinnati*, 84.
2. As the public or corporate interest in an improvement, rather than its location, determines the question of the right of taxation for its construction, the fact that a railway proposed to be built under such a statute by a municipal corporation will lie mainly in another state can make no difference. *Id.*
3. The Ohio act of 1869,—providing that any one of certain cities shall be authorized to construct a railway leading therefrom to any other terminus in that state or any other state, through the agency of a board of trustees to be appointed by a specified court of such city, after a majority of the city council shall have declared such railway to be essential to the interests of the city, and the undertaking shall have received the sanction of a majority of the electors of the city at a special election,—is not in conflict with the provisions of the constitution of the state.
 1. Such an act, by authorizing the judges of the courts named to appoint trustees, does not exercise an appointing power which is forbidden to the legislature by section 27 of article 2 of the constitution.
 2. Neither does the act violate the provision of section 14 of article 4 of the constitution, prohibiting judges from holding other offices. The appointment of trustees is the exercise of a judicial function.
 3. The omission of the act to fix the term of office and compensation of the trustees is not contrary to section 20 of article 2 of the constitution, requiring the legislature to fix the term of

MUNICIPAL CORPORATIONS—Continued.

office and compensation of all officers not provided for. The trustees are not officers within the meaning of that clause.

4. The act is not in violation of section 6 of article 8 of the constitution, forbidding the legislature to "authorize any county, city, town, or township, by vote of its citizens, or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever; or to raise money or loan its credit to or in aid of any such company, corporation, or association." The mischief interdicted is a business partnership between a municipality and individuals, or private corporations or associations. The provision is not to be construed so as to prohibit municipal corporations from making improvements on their own account and with their own means. *Ib.*

4. Unless expressly prohibited by a constitutional provision, a state legislature has power to authorize towns and counties through which a railway is located, to borrow money, issue their bonds, and subscribe for or purchase the stock of the railway company, to aid in constructing or completing the railroad. And in all cases where the legislature could have originally conferred the power, defective subscriptions may be ratified by subsequent legislation. *St. Joseph Township v. Rogers*, 105.
5. Where the authority to issue its bonds in aid of a railroad is conferred upon a municipality, to be exercised in a special manner, and subject to certain regulations, conditions, or qualifications, and the bonds issued show by their recitals that the power was exercised in the manner required, and that they were issued in conformity with those regulations, and pursuant to those conditions and qualifications, proof that any or all of those recitals are incorrect will not constitute a defense by the corporation to an action on the bonds or their coupons by an innocent holder for value, if it appears that it was the duty of the officers who executed the bonds to decide whether or not there had been an antecedent compliance with the regulation, condition, or qualification which, it is alleged, was not fulfilled. *Ib.*
6. The question whether the interest of the public in the building of a railroad by a private corporation is of such a nature as to warrant taxation in aid of its construction, under the general power of the legislature to authorize taxation for the public interest, is not a question of constitutional construction, but of general law; and therefore the decision of a state court on such a question is not controlling in the supreme court of the United States. *O'cott v. Supervisors of Fond du Lac County*, 115.
7. A railway, although constructed and owned by a private corpo-

MUNICIPAL CORPORATIONS—Continued.

- ration, is a public highway, in aid of the construction of which the power of the state to tax may properly be exerted. The ownership of the property is not a test as to whether the use of it is public or private. *Ib.*
8. That a legislative act: empowering a county to raise money by taxation to aid in the construction of a railway, authorizes the county to make a donation to the railway company, instead of a subscription to its stock, is not an objection to the constitutionality of the act. The right to tax depends upon the use to which the tax is applied; not the manner of its application. *Ib.*
 9. Where the county orders issued to aid the construction of a railway were, when issued, valid under the constitution and laws of the state as previously expounded by its judicial tribunals, and understood at the time, no subsequent action of the legislature or the judiciary can be regarded by the courts as establishing the invalidity of such orders. *Ib.*
- As to the construction and operation of railways in the streets of a city, see LANDS, 12, 18, 16, 17; NEGLIGENCE, 6, 7, 12, 13.

NEGLECTENCE.

1. In an action against a railway company to recover damages for causing the death of a conductor, the evidence showed that the fence along the railway was out of repair, and, some horses being on the track at that point, they were run into by the train in charge of the deceased, the train thrown off the track, and the conductor killed. *Held*, that although the statute of Iowa required the railway company to erect and maintain such fence, these facts did not, under that statute, constitute any ground for such an action. Nor could the railway company be held liable on the ground of negligence; the deceased being the superior officer of the train, and having directed the line of conduct which resulted in his death. *Dewey v. Chicago & North Western R. Co.*, 360.
2. In such cases, new trials should be granted by the *nisi prius* courts whenever the verdict of the jury fails to administer substantial justice to the parties. The more limited rule which controls appellate tribunals, has no application to courts at *nisi prius*. *Ib.*
3. In an action against a railroad company to recover damages for injuries sustained by the plaintiff while in the defendant's station, from an explosion of the boiler of a locomotive of the defendant, the mere fact of such explosion is not conclusive evidence of negligence on the part of defendant; it is pro-

NEGLIGENCE—*Continued.*

sumptive evidence only, throwing the burden of disproving negligence upon the defendant. *Illinois Central R. R. v. Phillips*, 374.

4. Where, in such a case, it is shown that the iron used in the construction of the boiler is of the kind usually employed, has been subjected to and resisted the usual tests, and has been used by experienced persons with prudence and skill, this presumption is overcome, and the inference must be that the explosion occurred from some latent defect, not detected by the usual and proper tests. *Ib.*
5. The case of *Illinois Central R. R. Co. v. Phillips*, 49 *Ill.* 234, upon this point, affirmed upon a rehearing. *Ib.*
6. A railroad company is held to the exercise of a very high degree of care and diligence in operating its road through the public streets of a city, but the care and caution in this respect are required to be exercised in reference to the proper uses of the street as a thoroughfare of travel, rather than to the safety of persons in wrongfully getting on their cars when running. *Chicago, Burlington, & Quincy R. R. Co. v. Shumpe*, 385.
7. The duty of a railroad company operating its road under such circumstances is to use every reasonable precaution, not every absolutely necessary precaution, to avoid injury to individuals. *Ib.*
8. If a traveler upon the highway, on nearing a railway crossing, can, by vigilant use of his eyes and ears, ascertain whether a train is approaching, in time to avoid a collision, the omission to do so is, if a collision occur, negligence contributing to such collision, and will bar a recovery for an injury thereby caused to him, even though the railroad company may also have been guilty of negligence. *Davis v. New York Central & Hudson River R. R. Co.*, 394.
9. But the traveler is not required to stop, or, if riding, to leave his vehicle and go to the track, or to stand up, in order to look and listen for an approaching train. *Ib.*
10. In an action against a railway company to recover damages for injuries to the plaintiff from a collision with defendant's train at a point where the railroad crossed a highway, the evidence showed that the plaintiff was being driven in an open wagon in the day time along the highway, and that the track and the usual sign at such crossings were visible a distance of five rods in the direction from which he came. The plaintiff testified that he did not know of the crossing, and did not look to see if a train was approaching; that the driver was driving carefully, and his horse was very reliable. *Held*, that there was no evidence that the plaintiff was exercising due care; and the burden of proof being upon him to show due care on his own

NEGLIGENCE—*Continued.*

part as well as negligence by the defendant, the jury should have been instructed to find for the defendant. *Allyn v. Boston & Albany R. R. Co.*, 399.

11. In an action against a railway company to recover damages for injuries to the plaintiff from being struck by defendant's train at its station, the evidence showed that the plaintiff was at the time crossing the south track of the railway to take a train about to start, standing on the north track, when he was struck by another train going eastward on the south track at an unusual time and speed, and giving no warning of its approach. It was usual for passengers to cross the track in the same manner as plaintiff, and several were in fact crossing it at that time. Although there was no evidence that the plaintiff looked westward to see if a train was approaching, it appeared that while walking the first twenty feet of the distance of forty feet across the platform to the track he was looking westward to see another person, and the track was within his view, but he neither saw nor heard the train by which he was injured. *Held*, that the circumstances might amount to an implied invitation on the part of the defendant to the plaintiff to cross the track, and furnished some reason for not using the degree of care requisite where one's safety depends wholly on his own watchfulness; and the question whether the plaintiff exercised due care should be submitted to the jury. *Wheelock v. Boston & Albany R. R. Co.*, 402.
12. Sending a child little more than three years old across the track of a street railroad, attended only by another child nine and one-half years old, is not necessarily such negligence on the part of its parents as would defeat a recovery in an action brought by the child's administrator against the railroad company for damages for causing its death by negligently running over it while crossing the track. *Ihl v. Forty-Second Street & Grand Street Ferry R. R. Co.*, 409.
13. In such an action the conduct of the child may have an important bearing on the question of the defendant's negligence; but if the latter was clearly negligent, contributory personal negligence on the part of an infant, obviously not *sui juris*, cannot be alleged, unless negligence on the part of his guardian or custodian has brought about the situation, or in some manner contributed to the injury. *Id.*
14. In an action against a railway company to recover damages for the loss of a colt which had been run over and killed by the defendant's train,—*Held*, that the facts that the colt had been taken up by the plaintiff as an estray, and that, in attempting to comply with the law respecting estrays, the plaintiff had

NEGLIGENCE—Continued.

- not posted the animal in the mode required by law, did not constitute a defense. Such a case is within the rule that any person in the peaceable possession of property may sue and recover for any wrongful damage it may sustain, against any person but the owner. *Chicago & Northwestern R. Co. v. Skults*, 417.
15. In an action for damages for an injury to property resulting from the negligence of the defendant, the plaintiff may be allowed interest on the value of the property from the date of the injury. *Id.*
 16. In an action against a railway company to recover damages for injuries to the plaintiff's cattle, run over by a locomotive on the defendant's road, declarations by the engineer in charge of the locomotive, made subsequent to the time of the accident, at a distant place, and when he was not engaged in any business of the defendant's, are not admissible as evidence against the company. *Michigan Central R. R. Co. v. Gougar*, 421.
 17. In an action against a railway company to recover damages for injuries to the plaintiff's horse and wagon by a collision with the defendant's train at a highway crossing, caused by the negligence of defendants, the fact that the horse was frightened and not under the control of any one at the time of the collision, having been left unfastened and run away, is not conclusive of such want of care on the part of the plaintiff as will defeat the action. *Southworth v. Old Colony & Newport R. Co.*, 426.
 18. In an action against a railway company to recover the value of a horse owned by the plaintiff, run over and killed by the defendant's engine, the fact that the horse was turned loose by the plaintiff upon the open prairie, four or five miles from the defendant's track, is not such conclusive evidence of negligence on the part of the plaintiff as to defeat his recovery. *Pacific R. R. Co. v. Nash*, 430.
 19. In such an action, testimony as to whether the railway track was fenced at the place where the horse was killed is competent as showing the degree of care necessary. *Id.*
 20. Where a statute requires that in case cattle or other obstructions appear before a train on a railway track, the whistle of the engine shall be blown, the brakes put down, and every possible means employed to stop the train, and provides that a railway company failing to observe these precautions shall be responsible for any damage to persons or property, from accidents or collisions upon its road, it is no defense to an action against a railway company for damages to cattle by its train, in a case where these precautions were not taken, to show that a compliance with the statute would not have prevented the injury. *Nashville & Chattanooga R. R. Co. v. Thomas*, 438.

NEGLIGENCE—Continued.

21. A railroad company which has leased and is actually operating a railroad is liable in damages for injuries caused by its servants in their management of the road. Its liability is not affected by the terms of a contract made with its lessor limiting its responsibility to payment of operating expenses and for making necessary repairs. *Louisville & Nashville R. R. Co. v. Norton*, 436.
22. In an action against a railroad company to recover the value of cattle killed by a locomotive and train on defendant's road, it appeared the cattle could have been seen on the track by the engineer for a distance of more than half a mile; yet he made no effort to avoid the danger, and rushed on at a rapid rate, without any signal to give the alarm. Held, that it was gross negligence on the part of the engineer not to stop the train in time to avoid the danger, for which the company should be held responsible, even though the cattle were upon the track without the fault of the company. *Chicago & Northwestern R. Co. v. Barrie*, 451.
23. A statute which requires railroad companies to erect and maintain fences along their tracks, and makes them liable, in case they neglect to do so, for all injuries to animals straying upon their tracks, imposes upon them the duty of exercising a high degree of diligence in keeping such fences in repair. Ordinary diligence, as usually defined, is not sufficient. *Antisdel v. Chicago & Northwestern R. Co.*, 467.
24. A railway company is liable in damages for the destruction of property adjoining its road, by fire communicated from sparks emitted from a locomotive on its road, if such emission results from the negligent acts of the servants of the company, or the unskillful construction of the engine. *Jackson v. Chicago & Northwestern R. Co.*, 473.
25. The omission of a railway company to use the best contrivances known to prevent the spread of fire from its locomotives is negligence, for which the company is liable for all injuries to others resulting from the want of such attachments. *Ib.*
26. When the facts are agreed, what constitutes negligence is a question of law, and an appellate court can determine what is shown in the facts as readily and as fully as the court from which the appeal is taken. *Kansas Pacific R. Co. v. Butts*, 477.
27. Where a railway company is authorized to operate its line with locomotives propelled by steam, generated by fire, and uses a locomotive, provided with all the most approved appliances in use for preventing injuries by the escape and communication of fire therefrom, in good order, and operated by competent and

NEGLIGENCE—Continued.

- careful servants of the company, if, owing to a high wind, fire escapes, and spreading, burns the property of another, this is not negligence on the part of the company. *Ib.*
28. Allowing standing grass and weeds to remain on the right of way and in the ditch beside the track of a railway company, is not necessarily negligence on the part of the company, making it liable for damages from the spreading of a fire communicated from the company's engine. *Ib.*
 29. Allowing combustible material,—as dry grass and stubble,—to accumulate and remain upon and beside a railway track, liable to be set on fire by sparks and cinders thrown from passing locomotives, where there is nothing incombustible between the land of the railroad company and that of adjoining owners, to prevent the spread of fire, is a state of facts from which a jury may find negligence on the part of the railway company, rendering the company liable to an adjoining proprietor whose property is destroyed by fire communicated to it in that manner. *Kellogg v. Chicago & Northwestern R. Co.*, 483.
 30. But the failure of such adjoining proprietor to remove the dry grass or stubble from his own land, in order to prevent the spread or communication of fire set by the negligence of the railway company is not such negligence on his part, contributing to the destruction of his own property, as will defeat his right to recover for the injury from the railway company. *Ib.*
 31. The damage sustained by an adjoining proprietor, whose buildings and other property, situated at a distance from the line of a railway, are destroyed by fire communicated from an engine on the railway, to the grass and stubble on land of the railway, and thence by similar combustible material on his own land to the buildings and property destroyed, are proximate, not remote, within the meaning of the maxim, "*causa proxima, non remota, spectatur.*" The rule is not that the injury sustained must be the necessary or unavoidable result of the wrongful act, but that it shall be the natural and probable consequence of it, or likely to ensue from it. The destruction of property in the manner stated, is a result reasonably to be anticipated from the firing of the combustible material on the railway track; and the omission to remove it may properly be considered, by the jury, negligence with respect to the property destroyed. *Ib.*

NEW TRIALS.

New trials should be granted by the courts at *nisi prius*, whenever the verdict of the jury fails to administer substantial justice

NEW TRIALS.—*Continued.*

to the parties. The more limited rule which controls appellate tribunals, has no application to courts at *nisi prius*. *Dewey v. Chicago & Northwestern R. Co.*, 869.

NOTICE.

As to limiting liability of carrier by notice, see **CARRIERS**, 20.

OFFICERS.

1. Statements made in a letter or other document written by an officer of a railway corporation, not accompanied by proof that he had authority to represent the company, or that his duties extended to the business in question, are not admissible in evidence against the company. *Commonwealth v. Pittsburgh, Fort Wayne, & Chicago R. R. Co.*, 220.
2. Although the language of the act of North Carolina of February 16, 1871,—which requires the president and directors of a railroad company to account with and transfer to their successors all the money, books, papers, and choses in action belonging to such company, and makes a failure to do so a misdemeanor,—is sufficiently general to include bonds of the state, yet that act cannot be construed to apply to the special tax bonds which, by the acts of February 5 and March 8, 1870, are required to be returned to the public treasurer; and an indictment against the president of a railroad company, for refusing to transfer to his successor such special tax bonds, cannot be sustained. *State v. Jones*, 228.
8. In a criminal prosecution founded on a statute requiring all presidents of railroads in which the state is interested under any act or ordinance passed after a specified date, to return to the public treasurer all bonds of the state remaining in the hands of such president, an indictment which merely charges that the defendant was president of a certain named railroad, and as such refused to return bonds which had come into his hands, is fatally defective for want of averments that the state had an interest in the road named, and that the bonds were received by the defendant under an act passed after the date specified. A motion to quash such an indictment should be granted. *State v. Sloan*, 286.

PASSENGERS.

As to the power of the legislature to regulate fares for passengers, see **CARRIERS**, 6.

As to the obligation to carry passengers, see **CARRIERS**, 8.

PLEADING.

1. The declaration in an action against a railway company, commenced October 30, 1868, to recover for an injury to a colt owned by the plaintiff, resulting from a failure to fence along the track, alleged that "on January 1, 1867, and from thenceforward to the commencement of this suit, the defendants were possessed and had the entire control of" the road, "and had the right to run upon the same locomotives and trains." It also alleged that "the defendant, more than six months after the said railroad was in use, and continuously to the time of committing the grievances," &c., neglected to comply with the requirements of the statute in regard to fences. *Held*, that it did not appear with sufficient certainty that the defendant had failed to erect proper fences after the road had been "opened for use" a period of six months, that time being allowed by the statute; and a demurrer to the declaration must be sustained. *Toledo, Peoria, & Warsaw R. R. Co. v. Bookless*, 454.
2. An allegation in a complaint that certain colts and sheep owned by plaintiff, having strayed, without any fault of the plaintiff, upon the track of the defendant, a railway company, the defendant "so carelessly and negligently ran and managed its locomotive and cars, and its railroad track, grounds, and fences, that its locomotive and cars ran against and over said horses and colts," &c., is not a sufficient statement of a cause of action for injuries caused by neglect of the company to maintain proper fences in consequence of which the animals strayed on the track and were killed. *Antidel v. Chicago & Northwestern R. Co.*, 467.
3. But as such an allegation sufficiently avers negligent management of the train, it will be presumed, on appeal, in order to sustain a judgment for the plaintiff, that there was evidence on the trial to warrant a recovery on that ground, where the bill of exceptions does not purport to contain all the evidence. *Id.*

As to the sufficiency of averments in indictments, see **INDICTMENT**, 2.

PRESUMPTIONS.

As to presumption of negligence from explosion of locomotive boiler, see **NEGLIGENCE**, 3-5.

PRINCIPAL AND AGENT.

As to when the consignor is agent of the consignee to ship goods, see **CARRIERS**, 10-12.

As to when a carrier is agent of the consignee to receive goods, see **CARRIERS**, 21.

QUESTIONS OF LAW AND OF FACT.

As to the distinction between questions of law and questions of fact, see **CARRIERS**, 23; **NEGLIGENCE**, 25.

REASONABLE TIME.

As to what is a reasonable time to remove goods ready for delivery by carrier, see **CARRIERS**, 22, 23.

To repair breach in fence, see **FENCES**, 8.

SALES.

A sale and transfer of shares of stock in a railway company carries with it dividends upon such shares previously declared, but payable at a date subsequent to such sale and transfer. *Burroughs v. North Carolina R. R. Co.*, 213.

SCALING LAWS.

As to when scaling laws are applicable to railroad bonds, see **BONDS**.

SPECIFIC PERFORMANCE.

A bill in equity by a private individual for the specific performance of a contract by a railway company to locate its depot at a particular place, cannot be sustained. Specific execution of a contract in equity is not a matter of absolute right in the party, but of sound discretion in the court; and as railway companies are incorporated for the public good, the court must, in such a case, have regard to the interests of the public, and leave the complainant to his remedy by action for damages. *Marsh v. Fairbury, Pontiac, & Northwestern R. Co.*, 82.

STATIONS.

A bill in equity by a private individual for the specific performance of a contract by a railway company to locate its depot at a particular place, cannot be sustained. Specific execution of a contract in equity is not a matter of absolute right in the party, but of sound discretion in the court; and as railway companies are incorporated for the public good, the court must, in such a case, have regard to the interests of the public, and leave the complainant to his remedy by action for damages. *Marsh v. Fairbury, Pontiac, & Northwestern R. Co.*, 82.

STATUTES.

The authority of a railroad corporation to locate its road, as affected by various special acts in amendment of its charter, and by the general statutes of New Hampshire, considered. *Melvin v. Hoitt*, 195.

As to statutes impairing the obligation of contracts, see **CARRIERS**, 1, 2.

STATUTES—Continued.

- Statutes to prevent unjust discriminations by carriers, see **CARRIERS**, 1-5.
- Statutes regulating passenger fares, see **CARRIERS**, 6.
- Statutes requiring railroads to fence their tracks, see **FENCES**, 1, 6-12, 15.
- Statutes authorizing consolidation of railway companies, see **CARRIERS**, 9.
- Statutes authorizing municipalities to aid railways, see **MUNICIPAL CORPORATIONS**, 1-9.
- Statutes taxing railroads, see **TAXES**, 5-11.
- Statutes requiring officers of railway companies to account for property in their custody, see **OFFICERS**, 2, 8.

STOCK.

1. Subscriptions for shares in the M. Railroad, a corporation chartered by the state of New Hampshire, were received in a book which contained the condition that the subscribers should not be liable for payment of their subscriptions until a specified number of shares should be taken. A corporation was subsequently chartered by the state of Massachusetts, under the same name, with power to unite with the M. Railroad in New Hampshire; and the town of W. in Massachusetts was empowered to subscribe for a certain amount of stock in the Massachusetts corporation, and did so subscribe. Afterwards the two corporations united, forming one line from P., in New Hampshire, to W., in Massachusetts, and from that time they were operated as one. Without including the subscriptions of the town of W., the number of shares of stock in the M. Railroad required by the subscription book to be taken before the subscribers became liable to pay, were not taken. In an action by the corporation against one of the subscribers,—*Held*, that, inasmuch as the Massachusetts corporation was not in existence at the time of the subscription, there was no latent ambiguity in the contract as to what was meant by the M. Railroad, and parol evidence was therefore not admissible to show that the parties understood and intended by it the united enterprise of a railroad from P. to W.: hence, that the condition upon which the subscription was made had not been performed, and the defendant was not liable to pay for the shares. *Monadnock Railroad v. Felt*, 186.
2. A subscription for shares in the stock of a railway corporation is a contract to which the subscriber and the corporation are parties, and the assent of both is essential. *Melvin v. Hoyt*, 195.

STOCK—Continued.

3. The signing of subscriptions at the request of individual directors, upon terms and conditions different from and not consistent with the basis of subscription adopted by the corporation, does not constitute a valid contract between the signers and the corporation; and they cannot be considered members, and have no right to vote as such at the meetings of the corporation. *Ib.*
4. But subscriptions made upon terms and conditions different from those proposed by the railroad company may be acquiesced in by the corporation, and the subscribers accepted as members. *Ib.*
5. A sale and transfer of shares of stock in a railway company carries with it dividends upon such shares previously declared, but payable at a date subsequent to such sale and transfer. *Burroughs v. North Carolina R. R. Co.*, 213.
6. A nominal increase in the number of shares of stock in a railway corporation, without any transfer to the shareholders of anything of value from the treasury or property of the corporation, —merely watering the stock, —is not a dividend within the letter or spirit of an act imposing a tax upon all dividends to shareholders, including stock dividends. *Commonwealth v. Pittsburgh, Fort Wayne, & Chicago R. R. Co.*, 220.
7. The fact that the new form of the stock gives it a greater commercial value does not render the increase in the number of shares a dividend of any profit or property of the company. *Ib.*

As to effect of conditional subscriptions to stock, see **LANDS**, 9, 10.

As to subscriptions to stock by municipalities, see **MUNICIPAL CORPORATIONS**, 1-9.

STREET RAILROADS.

As to compensation to owners of lands adjoining street occupied by railroad, see **LANDS**, 12, 13, 16, 17.

As to liability for injuries to persons crossing track of street railroad, see **NEGLIGENCE**, 6, 7, 12, 13.

TAXES.

1. The question whether the interest of the public in the building of a railroad by a private corporation is of such a nature as to warrant taxation in aid of its construction, under the general power of the legislature to authorize taxation for the public interest, is not a question of constitutional construction, but of general law; and therefore the decision of a state court on such a question is not controlling in the supreme court of the

TAXES—Continued.

- United States. *Olcott v. Supervisors of Fond du Lac County*, 115.
2. A railway, although constructed and owned by a private corporation, is a public highway, in aid of the construction of which the power of the state to tax may properly be exerted. The ownership of the property is not a test as to whether the use of it is public or private. *Ib.*
 3. That a legislative act empowering a county to raise money by taxation to aid in the construction of a railway, authorizes the county to make a donation to the railway company, instead of a subscription to its stock, is not an objection to the constitutionality of the act. The right to tax depends upon the use to which the tax is applied; not the manner of its application. *Ib.*
 4. Where county orders issued to aid the construction of a railway were, when issued, valid under the constitution and laws of the state as previously expounded by its judicial tribunals, and understood at the time, no subsequent action of the legislature or the judiciary can be regarded as establishing the invalidity of such orders. *Ib.*
 5. A state statute imposing a tax upon railway and other corporations according to the amount of goods carried by them, of which the substantial burden rests, not upon the franchise or property of such companies, but upon the freight transported by them, is repugnant to the provision of the constitution of the United States, giving Congress power to regulate commerce, so far as it applies to goods other than those taken up and delivered within the state. *Philadelphia & Reading R. R. Co. v. Pennsylvania*, 127.
 6. A state statute, imposing a tax upon railway and other corporations according to their gross receipts, is not repugnant to the provision of the constitution of the United States giving Congress power to regulate commerce. The substantial burden of such law rests, not upon commerce, but upon the property and franchises of the companies; the value of which may properly be measured by their gross receipts. *Philadelphia & Reading R. R. Co. v. Pennsylvania*, 142.
 7. In assessing real property belonging to a railway company, consisting of a strip of land but a few rods in width, upon which the railroad track is located, with the necessary stations, buildings, &c., the land should not be assessed as an isolated piece of property, but as part of the whole railway; and its value should be estimated in connection with its position, and the

TAXES—Continued.

- business and profit derived therefrom. *People ex rel. Buffalo & State Line R. R. Co. v. Barker*, 149.
8. The provision of 1 *N. Y. Rev. Stat.* 889, § 6,—that “the real estate of all incorporated companies liable to taxation shall be assessed in the town or ward in which the same shall be, in the same manner as the real estate of individuals,”—applies to lands of a railway company over which their road is located; and such land is properly assessed to the railway company by the assessors of the town or ward in which it is situated, and not as “non-resident” lands. *Id.*
 9. *It seems*, that, within the meaning of the laws for the assessment of taxes, a railroad corporation is a resident of all the towns through which its road is located. *Id.*
 10. For purposes of taxation a railway corporation is to be regarded as a resident of each town and county through which its road passes; and its real estate may therefore be properly assessed in the town or county where the land is situated, as real estate of a resident, and not as land of a non-resident. *Buffalo & State Line R. R. Co. v. Supervisors of Erie County*, 163.
 11. The decision of the assessors upon the question whether real estate of a railway corporation, whose principal office is located in another county, shall be assessed as resident or non-resident land, cannot be attacked collaterally. In all cases within their jurisdiction assessors act judicially in making assessments, and the assessment roll has the force of a judgment. The tax so assessed by them cannot be recovered back after it has been paid into the public treasury. *Id.*
 12. A nominal increase in the number of shares of stock in a railway corporation, without any transfer to the shareholders of anything of value from the treasury or property of the corporation,—merely watering the stock,—is not a dividend within the letter or spirit of an act imposing a tax upon all dividends to shareholders, including stock dividends. *Commonwealth v. Pittsburgh, Fort Wayne, & Chicago R. R. Co.*, 220.
 13. The fact that the new form of the stock gives it a greater commercial value does not render the increase in the number of shares a dividend of any profit or property of the company. *Id.*

TENANT FOR LIFE.

As to right of life tenant of lands to construct railroad upon them, see **LANDS**, 15.

TIME.

See **REASONABLE TIME**.

TRIAL.

The discretion of a jury to judge of the credibility of witnesses is not arbitrary; they must exercise their discretion,—not their will, merely. In this respect the action of a jury may be reviewed by an appellate court. *Chicago, Burlington, & Quincy R. R. Co. v. Stumps*, 355.

ULTRA VIRES.

As to contracts by railway company *ultra vires*, see **CARRIERS**, 8.

WAREHOUSEMEN.

As to when carrier of goods is liable as warehouseman only, see **CARRIERS**, 17-19, 21-26.

WAYS.

As to conveyance of right of way to railroad company, see **LANDS**, 9-11, 14.

As to reservation of right of way in conveyance to railroad company, see **LANDS**, 11, 12.

WITNESSES.

As to credibility of witnesses, see **APPEAL**, 1.

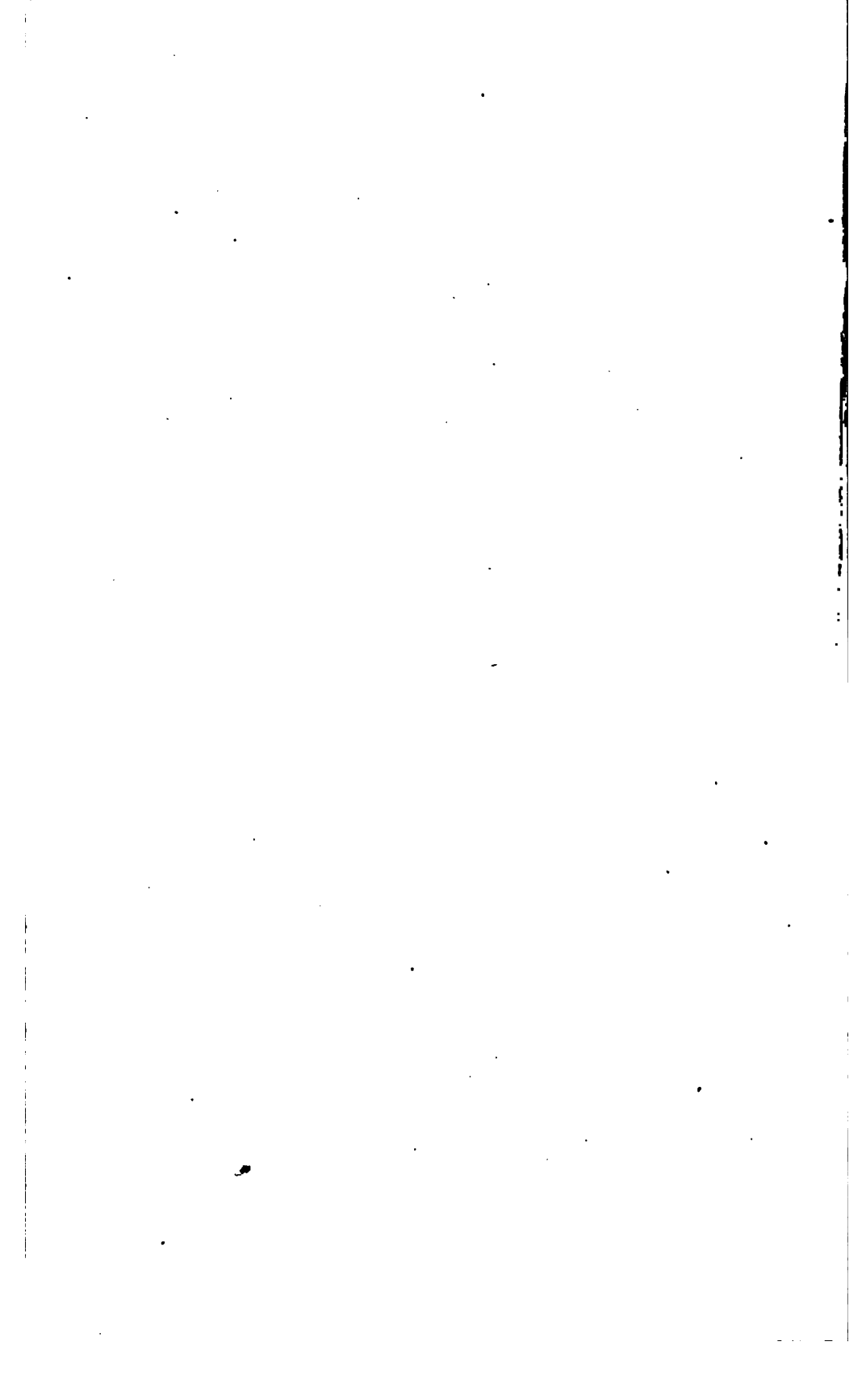
THE END.











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